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No. _____

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1995

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FULLY INFORMED JURY ASSOCIATION, *et al.*,
*Petitioners,*

v.

COUNTY OF SAN DIEGO, *et al.*,
*Respondents.*

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**Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

A debate is occurring throughout the country concerning the issue of jury nullification (i.e., that jurors have not only the power to decide the facts but also the law in a criminal case).

Proponents argue that jury nullification is an inherent power vested in jurors, which serves as a check on government's power. Opponents argue that jurors should not be vested with such a power, as it undermines the letter of the law. Regardless of which side might be correct, jury nullification is clearly a political issue.

At issue in this case are two general orders issued by San Diego County municipal and superior courts. The first, General Order No. 102093, prohibits distribution of jury nullification materials within 150 feet of any entrance to any San Diego County court. The second, General Order No. 2-14-94, ordered removal of all newsracks from in front of the San Diego County Courthouse.

The questions presented by this petition are:

1. Whether the order prohibiting distribution of jury nullification materials in a traditional public forum is an unconstitutional content-based regulation of political speech.

2. Whether the order removing newsracks from a traditional public forum is an unconstitutional content-based regulation of speech and the press.

3. Whether the order removing newsracks from a traditional public forum is an unconstitutional time, place, or manner regulation of speech or the press.

## PARTIES TO THE PROCEEDING

The parties to the proceedings below were the petitioners Fully Informed Jury Association, CAL-FIJA, Liberty Lobby, Inc., Dave Cadway, and Jim Harnsberger.

The respondents before this Court include: the County of San Diego; the City of San Diego; Michael Sgobba, San Diego Marshal; Jerry Sanders, San Diego Chief of Police; Jim Roach, San Diego County Sheriff; San Diego County Superior Court; San Diego County Municipal Court, San Diego Judicial District; San Diego County Municipal Court, El Cajon Judicial District; San Diego County Municipal Court, South Bay Judicial District; and San Diego County Municipal Court, North County Judicial District.

Petitioners Fully Informed Jury Association and Liberty Lobby, Inc. have no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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## PETITION FOR WRIT OF CERTIORARI

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The petitioners Fully Informed Jury Association ("FIJA"), CAL-FIJA, Liberty Lobby, Inc. ("Liberty"), Dave Cadway ("Cadway"), and Jim Harnsberger ("Harnsberger") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on February 23, 1996.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit has not been reported and is reprinted in the appendix hereto, p. 1a, *infra.*

The opinion of the United States District Court for the Southern District of California (Thompson, D.J.) has not been reported and is reprinted in the appendix hereto, p. 4a, *infra.*

## JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983, petitioners brought this suit in the U.S. District Court for the Southern District of California. On October 31, 1994, the Southern District denied petitioners' motion for a preliminary injunction. (p. 4a, *infra.*)

On petitioners' appeal, the Ninth Circuit on February 23, 1996, entered a judgment and opinion affirming the Southern District's order. (p. 1a, *infra.*) No petition for rehearing was sought. The jurisdiction of the Ninth Circuit was invoked pursuant to 28 U.S.C. § 1292(a)(1).

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND GENERAL ORDERS INVOLVED

Relevant portions of the First and Fourteenth Amendments to the Constitution of the United States, San Diego County Superior and Municipal Courts General Order No. 102093 (p. 21a, *infra*), and San Diego County Superior Court General Order No. 02-14-94 (p. 23a, *infra*).

## INTRODUCTION

This case is an example of judicial power exceeding its scope and limits, which resulted in the abandonment of well established principles embodied in the First Amendment's protection of freedom of speech, press, petition, and association; it is an example of the age old tension between citizens and their government; and it is an example of what results when legislative, executive, and judicial powers are exercised by any one individual or group of individuals (in this case members of the judiciary).

This case arises from two general orders issued by San Diego County superior and municipal courts.[1] The first general order was issued on October 20, 1993, which prohibits petitioners and others from discussing or distributing written materials relating to jury nullification.

Jury nullification is a political principle that dates back to 1690 in the *Bushell's Case*, where William Penn had been charged with preaching before an unlawful religious assembly. The jury refused to convict Penn, and the judge, in retaliation, placed the jurors in jail. Simply stated: jury nullification is predicated upon the principle that in all criminal cases the jury is the judge of both the law and facts.

This principle has support throughout the country, including San Diego County. For example, the cities of Lemon Grove, Oceanside, San Marcos, and Vista support this principle and have shown their support by issuing proclamations establishing Jury Rights Day. In addition, the governors of the following states have recognized the jury's right to judge both the law and facts, and have established September 5th as Jury Rights Day: Indiana, Texas, Utah, Iowa, Montana, Wisconsin, Nebraska, Kansas, Vermont, Pennsylvania, and New Jersey.[2]

The second general order was issued on February 14, 1994, which ordered the removal of all newsracks located on the public sidewalk in front of the San Diego County Courthouse. The newsracks were located in front of the courthouse for several decades. This order was

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[1] In California, general orders are those orders issued by the presiding departments of a municipal or superior court regarding general court administration. These type of orders are neither case nor party related.

[2] The city and state proclamations will hereinafter be referred to as the "Proclamations." The Proclamations are included in Petitioners' Lodged Materials at pp. L36-L50.

purportedly issued for reasons of safety, security, and esthetics.

## STATEMENT OF THE CASE

Petitioner FIJA is a non-profit association organized under the laws of the State of Montana, and is tax exempt under Internal Revenue Code § 501(c)(3). FIJA publishes and distributes informational materials of various kinds (e.g., newsletters, books, tapes, leaflets, information kits, bumper stickers, etc.) concerning the principle of jury nullification. FIJA publishes and distributes (nationally, including San Diego County) a newsletter entitled, "the FIJActivist" and an information kit entitled, "Fija Jury Power Information Kit." FIJA is involved with public out-reach, distribution of educational materials, and lobbying concerning a proposed "Jury Rights Bill." (p. 26a, *infra.*; L1-L35.)

Petitioner CAL-FIJA is an unincorporated California association, which has thirty-four chapters throughout California. CAL-FIJA is involved with jury nullification, the Jury Rights Bill, and proposing a Jury Compensation Act (proposal to increase the amount of money paid to jurors). CAL-FIJA has a research body for educational materials, news service entitled "CAL-FIJA NEWS" (which has two San Diego reporters with press credentials), and a legislative department that is involved in the legislative process. CAL-FIJA is actively involved in the political arena and sponsors a speakers forum, provides inserts for newspaper publications such as The Spotlight, Liberty Amendment, and FIJActivist, and conducts an annual state convention. (pp. 26a-28a, *infra.*; L1-L35.)

FIJA and CAL-FIJA distribute political newsletters and materials concerning jury nullification: the FIJActivist, Citizens' Rule Book (which contains, *inter alia*, copies of the *Declaration of Independence, U.S. Constitution,* and *Bill of Rights*), FIJA True/False Brochure, Jury Com-

pensation Act and Jury Rights Bill flyer, Jury Compensation Act, Jury Power History brochure, proposed Jury Rights Bill, CAL-FIJA monthly invitation flyer, Fully Informed Jury Amendment, and FIJA Jury Power Information Kit (hereinafter collectively referred to as "FIJA Materials"). (L1-L35.)

In addition to the above-mentioned activities, FIJA and CAL-FIJA are involved in the political process. For example, they submit a Legislator Questionnaire (regarding jury nullification) to political candidates. (L35). FIJA and CAL-FIJA have obtained San Diego County cities' and governors' proclamations, which recognize the jury's right to judge both the law and fact and which establish September 5th as Jury Rights Day. (L36-L50.)

Petitioner Liberty is a non-profit corporation organized under the laws of Washington, D.C. Liberty publishes a weekly political newspaper entitled, "The Spotlight," which is distributed nationally, including San Diego County.[3]

Petitioners Cadway and Harnsberger are involved and believe in the political principle of jury nullification, and are members of CAL-FIJA. Harnsberger is CAL-FIJA's state executive director and coordinator. Cadway is a distributor of The Spotlight and materials published by FIJA and CAL-FIJA. Cadway and Harnsberger also engage in political speech concerning jury nullification and distribute FIJA Materials. (pp. 27a-29a, 34a, *infra.*)

The respondents in this case are: the County of San Diego; the City of San Diego; Michael Sgobba, San Diego Marshall; Jerry Sanders, Police Chief of the City of San Diego; Jim Roach, San Diego Sheriff; San Diego Superior Court (the "Superior Court"); San Diego mu-

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[3] Excerpts from an issue of The Spotlight are contained in Petitioners' Lodged Materials at L51-L54.

nicipal courts for the judicial districts of San Diego, El Cajon, South Bay, and North County.[4]

In or about May, 1993, petitioners and other members of CAL-FIJA commenced weekly distribution of FIJA Materials and The Spotlight at the San Diego County Administration Building, the San Diego City Hall, the Courts, and in front of the entrance to the U.S. District Court for the Southern District of California. (pp. 29a, 34a, *infra.*)[5]

On June 24, 1993, Harnsberger and other members of CAL-FIJA were at the east entrance to the San Diego County Administration Building, where they were confronted by a man who identified himself as security for the County and who threatened to call the police if Harnsberger and members of CAL-FIJA did not cease distributing the FIJA Materials. (pp. 29a-30a, *infra.*) Similarly, on September 17th and 29th and October 14th, 1993, Harnsberger and other members of CAL-FIJA returned to the County's Administration Building and were met with the same intimidation and treatment. (pp. 29a-30a, *infra.*)

On August 31, 1993, petitioners were at the San Diego City Hall, where they were confronted by a man who identified himself as building security for the City and threatened to call San Diego police if they did not cease distributing FIJA Materials. (p. 30a, *infra.*) On September 17th and 29th and October 29th, 1993, Harnsberger and other members of CAL-FIJA returned to the San Diego City Hall and were met with the same intimidation and treatment. (p. 30a, *infra.*)

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[4] Hereinafter the San Diego County municipal and superior courts will be referred to collectively as "the Courts."

[5] The U.S. District Court is located directly across the street from the San Diego County Courthouse. It is important to note that petitioners never have been harassed, intimidated, or ordered to stop distributing the FIJA Materials or The Spotlight by anyone from the U.S. Attorney's or U.S. Marshal's offices, nor by a district court administrator or district judge. (p. 29a, *infra.*)

On October 22, 1993, the presiding judges of the Courts issued General Order No. 102093, which, in its relevant part, reads:

> "WHEREAS: Written materials are being distributed and handed to persons entering [courthouses] . . . These written materials [i.e., FIJA Materials] advocate *jury nullification* . . . distribution or attempted distribution of [FIJA Materials] within 50 yards of any public entrance to [courthouses] within this County is prohibited.
>
> Disobedience of this General Order is punishable as contempt of court."

(pp. 21a-22a, *infra.*)

Prior to issuance of General Order No. 102093, the Courts did not hold public hearings concerning the issue of distribution of jury nullification materials at San Diego County courts; nor were any requests made to interested parties to present their views; nor was any testimony taken or evidence presented. There was no evidence to support the conclusion that FIJA Materials were a danger to the integrity of the jury system. The Courts merely issued General Order No. 102093.

It is important to note that General Order No. 102093 was not issued from an *individual* courtroom involved in a *pending* litigation; nor was it directed at litigants before the court. Specifically, General Order No. 102093 reaches 150 feet outside every San Diego County courthouse door to punish distribution of FIJA Materials. (p. 30a, *infra.*)

It must be noted that General Order No. 102093 utilizes the court's contempt power over individuals who were not involved in a case before a court; it applies to everyone. General Order No. 102093 operates much like a local ordinance or state law, but deprives the violating individual the right to a trial by jury.

On October 25, 1993, Harnsberger, Cadway, and approximately twenty other CAL-FIJA members were distributing FIJA Materials and The Spotlight in front of the San Diego County Courthouse. Harnsberger and Cadway were approached by Marshall Sgobba's deputies, who apprised them of General Order No. 102093 and arrested Harnsberger for violation of said order. No one else was arrested for violation of General Order No. 102093. (p. 30a, *infra.*)

Harnsberger was subsequently convicted for criminal contempt at a contempt hearing (without a jury) for violation of General Order No. 102093. His writs for review of the criminal contempt conviction were denied by the court of appeals and California Supreme Court. (p. 12a, *infra.*)

Subsequent to the issuance of General Order No. 102093 and arrest of Harnsberger, petitioner Cadway and CAL-FIJA members ceased distributing FIJA Materials at the Courts for fear of being arrested and prosecuted. (p. 34a, *infra.*)

Between October 25, 1993, and February 14, 1994, Harnsberger wrote on numerous occasions to respondent Superior Court to inquire as to how FIJA and CAL-FIJA could obtain permission to distribute FIJA Materials outside the San Diego County Courthouse. In this regard, Harnsberger indicated that he wanted to place a newsrack by the entrance to the San Diego Courthouse (along with all the other newsracks) to distribute FIJA Materials. Harnsberger indicated that if other newspapers and political and commercial publications were permitted to have newsracks outside the San Diego Courthouse then CAL-FIJA and FIJA should also be permitted to distribute their materials in newsracks. Harnsberger never received any response to his written requests. (pp. 30a-31a, *infra.*)

In addition to the foregoing requests, Harnsberger made a personal visit to the clerk's office of the Superior

Court to request that the Superior Court provide "equal footing" for FIJA Materials with all of the other political and news materials distributed in the newsracks inside and outside the San Diego County Courthouse. (p. 31a, *infra.*)

Petitioners believe that in order to keep the FIJA materials from obtaining equal footing in newsracks in front of the San Diego County Courthouse, on February 14, 1994, the presiding judge of respondent Superior Court issued General Order No. 2-14-94, which ordered removal of all newsracks from in front of the San Diego County Courthouse. (pp. 31a-32a, *infra.*)

On or about March 4, 1994, pursuant to General Order No. 2-14-94, all newsracks (approximately 30) located on the public sidewalk in the front of the San Diego Courthouse were ordered removed and/or confiscated. Among those newsracks ordered removed and confiscated was the newsrack maintained and owned by petitioners Cadway and Liberty, which held and sold Liberty's newspaper, The Spotlight. Since March 4, 1994, the newsrack has not been returned, nor has it been replaced by Cadway or Liberty for fear of being arrested and prosecuted under General Order No. 2-14-94. (pp. 34a-35a, *infra.*)

Prior to issuance of General Order No. 2-14-94, respondent Superior Court made no attempt to contact or meet with petitioners or other members of the print media regarding any problems the newsracks might have been creating. Moreover, respondent Superior Court held no public hearings concerning placement or relocation of the newsracks; nor was any testimony taken or evidence presented. In short, there was no evidence as to *how* the newsracks (which had been there for several decades) were a danger to the security of the San Diego Courthouse.

Petitioners believe that General Order No. 2-14-94 was designed not to correct the alleged "safety" and "dignity" aspects of newsracks but rather to prevent FIJA Materials from being distributed in the newsracks in front of the San Diego Courthouse.

On July 21, 1994, petitioners filed a complaint in the U.S. District Court for the Southern District of California ("district court") requesting a temporary restraining order, preliminary and permanent injunctions, declaratory relief, and damages pursuant to 42 U.S.C. § 1983.

On August 15, 1994, the City respondents filed their motion to dismiss and motion for a more definite statement. On September 23, 1994, they filed their opposition to Petitioners' motion for preliminary injunction. On September 27, 1994, the County respondents filed their opposition to Petitioners' motion for preliminary injunction.

On October 31, 1994, the district court denied petitioners' motion for preliminary injunction and granted the City respondents' motion to dismiss on the ground that the two general orders were constitutional because they were valid place and manner restrictions on speech and press. (p. 4a, *infra.*)

On November 1, 1994, the district court clerk's judgment was entered. On November 28, 1994, petitioners timely filed their notice of appeal in the U.S. Court of Appeals for the Ninth Circuit. On February 23, 1996, the Ninth Circuit affirmed the district court's decision. (p. 1a, *infra.*)

## REASONS FOR GRANTING THE WRIT

### I. GENERAL DISCUSSION

The Ninth Circuit affirmed the district court's decision on the grounds that: (1) General Order No. 102093 is a content-based regulation of speech and press that is necessary to serve a compelling state interest (i.e., integrity of the jury system) and is narrowly drawn to achieve that end, citing as authority this Court's decisions in *Burson v. Freeman*, 504 U.S. 191 (1992) ("*Burson*"), and *Cox v. Louisiana*, 379 U.S. 559 (1965) ("*Cox*"); and (2) General Order No. 2-14-94 is a content-neutral regulation that is narrowly tailored to further a significant state interest (i.e., securing area around the courthouse) and leaves open alternative channels for communication, citing as authority this Court's decision in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) ("*Ward*"). (p. 1a, *infra.*)

The general orders implicate three central concerns in our First Amendment jurisprudence: regulation of political speech based upon content, regulation of political speech in a traditional public forum, and regulation of the press.

There can be no dispute that the general orders regulate political speech, as they are designed to prohibit discussion or dissemination of materials relating to jury nullification and to remove newspaper racks from a traditional public forum. This type of speech, concerning the affairs of government, "is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

This Court has made it clear that public sidewalks and streets are traditional public forums for purposes of First Amendment analysis; and as such, government's ability to restrict expression is very limited. *United States v. Grace*, 461 U.S. 171, 177 (1982) (permitting protest and distribution of political materials on the sidewalks around the U.S. Supreme Court).

It is well settled that the right to distribute newspapers, leaflets, and other political materials on public streets and sidewalks lies at the heart of our constitutional guarantees of freedom of speech and press. In *Hague v. C.I.O.*, 307 U.S. 496, 515- 516 (1939), this Court emphasized this point:

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for the purpose of assembly, communicating thoughts between citizens, and discussing general questions. Such use of the streets and public places has, from ancient times, been a part of privileges, immunities, rights and liberties of citizens . . . *but it must not, in the guise of regulation, be abridged or denied.*"

Moreover, this Court repeatedly has held that the First Amendment's freedom of speech, press, and assembly protection extends not only to traditional street corner, soapbox speeches, *Terminiello v. Chicago*, 337 U.S. 1 (1949), but virtually to all modes of communication that might be utilized to distribute ideas and expression on the public sidewalks and streets. See, e.g., *Police Dept. of Chicago v. Mosely*, 408 U.S. 92 (1977) (picketing); *Schneider v. State*, 308 U.S. 147 (1939) (leafletting).

Petitioners believe this petition presents important constitutional questions concerning the First Amendment's freedom of speech and press clauses.

## II. GENERAL ORDER NO. 102093 RAISES SERIOUS CONSTITUTIONAL QUESTIONS CONCERNING CONTENT-BASED REGULATION OF POLITICAL SPEECH IN A TRADITIONAL PUBLIC FORUM

Petitioners contend that this Court's decisions in *Burson* and *Cox* have been given unwarranted interpretations and applications by the Ninth Circuit, which has the effect of authorizing an unconstitutional content-based regulation of political speech in a traditional public forum.

In *Burson*, this Court approved Tennessee's prohibition of the display or distribution of campaign materials within 100 feet of the entrance to polling places. This Court did so on the ground that although the regulation was a content restriction on political speech, it was necessary to serve a compelling state interest and was narrowly drawn to achieve that end. *Burson*, 504 U.S. at 198.

The compelling interest identified by this Court in *Burson* was the prevention of voter intimidation and election fraud. *Id.* at 206. This was clearly evinced in the record by a long legislative history of Tennessee's regulation dating back to 1890. *Id.* at 205.

The case before the Court is distinguishable from *Burson* in many respects.

First, unlike the regulation in *Burson*, in the case before the Court there is absolutely no legislative history or evidence to support the conclusion that the FIJA Materials endanger the integrity of the jury system. The respondents, without a public hearing, decided to prohibit the discussion or distribution of materials relating to jury nullification within 150 feet of all San Diego County courts.

Second, there is no evidence in the record to suggest that the issue of jury nullification could not be addressed by judges during *voir dire*. In fact, there is no evidence as to whether respondents even considered this alternative. This is more evidence to support petitioners' position that General Order No. 102093 is nothing more than a capricious edict promulgated by respondents.[6]

Third, the absence of any evidence as to whether *voir dire* would address the issue of jury nullification is rele-

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[6] This position is also supported by the fact that petitioners distribute the FIJA Materials in front of the U.S. District Court but never have been ordered to stop those activities; nor has there been any indication that the District Court has encountered any problems with those materials. (p. 29a, *infra*.)

vant to the issue of whether respondents have proven that General Order No. 102093 is narrowly tailored.

Fourth, in *Burson*, the regulation operated only on election day; whereas General Order No. 102093 operates all year.

Finally, the regulation in *Burson* was the result of legislative deliberations and proceedings, which commenced in 1890. Conversely, in the case before the Court, there were no legislative hearings held, no evidence presented, no public testimony taken, and no opposing views presented. In short, respondents decided on their own to address an issue that was occurring *outside* the courthouse and promulgate a rule of their own making.

The foregoing demonstrates that the Ninth Circuit gave unwarranted interpretation of *Burson* and misapplied *Burson* to the case before the Court.

The Ninth Circuit's reliance on *Cox* is misplaced.

At issue in *Cox* was a Louisiana statute that prohibited picketing near a courthouse. This Court upheld that statute on the ground that it was narrowly drawn to protect the legitimate interest of protecting Louisiana's judicial system from pressures that might be created by picketing near a courthouse.

In *Cox*, this Court was careful to point out that the Louisiana statute did not regulate speech alone: "We deal in this case not with free speech alone, but with expression *mixed with particular conduct*." *Cox*, 379 U.S. at 564 (emphasis added). Specifically, the conduct prohibited was picketing and parading in locations in or near a courthouse. *Id.* at 562.

In the case before the Court, General Order No. 102093 prohibits distribution of FIJA Materials by specifically mentioning the term "jury nullification" in the wording of that order (see pp. 21a-22a, *infra*). On the one hand, *Cox* proscribes *conduct*; on the other hand, General Order No. 102093 proscribes speech.

In addition, in *Cox*, 2,000 protestors were engaged in conduct directed at a *specific* case and set of individuals; whereas, petitioners merely discussed and distributed the FIJA Materials at San Diego County state and federal courthouses. There is absolutely no evidence in the record to establish that petitioners were targeting specific cases, parties, or jurors; nor is there any evidence in the record to establish that petitioners ever gave FIJA Materials to jurors. In short, the record is devoid of any evidence whatsoever to support General Order No. 102093.

More importantly, *Cox* is inapplicable to the case before the Court for a more fundamental reason: unlike this case, *Cox* did not deal with a *content-based* regulation.

As the foregoing demonstrates, the case before the Court provides a set of facts that do not fit within this Court's decisions in *Burson* or *Cox*. *Burson* concerned speech on one particular date and in one particular location, with a well developed record that the regulation *would* protect against voter intimidation and election fraud. *Cox* concerned a content-*neutral* regulation of conduct, not speech alone.

Petitioners believe that General Order No. 102093 is an unconstitutional content-based regulation of political speech in a traditional public forum. Accordingly, petitioners respectfully request the Court to grant their petition to consider Question 1.

## III. GENERAL ORDER NO. 2-14-94 RAISES SERIOUS CONSTITUTIONAL QUESTIONS CONCERNING REGULATION OF POLITICAL SPEECH AND THE PRESS IN A TRADITIONAL PUBLIC FORUM

As an initial matter, petitioners would like to emphasize the fact that the removal of the newsracks (including petitioner Liberty's) from in front of the San Diego County Courthouse was a direct consequence of petition-

ers' desire to place FIJA Materials in a newsrack. At first glance it might appear that the two general orders are unrelated, but a closer look proves otherwise.

The newsracks were located in front of the courthouse for several decades. It was only after petitioner Harnsberger's numerous requests to place FIJA Materials in a newsrack that the San Diego Superior Court issued General Order No. 2-14-94. Consequently, petitioners argue that the issuance of General Order No. 2-14-94 was not a coincidence but rather an effort to prevent the distribution of FIJA Materials. After all, if the Superior Court denied petitioners' request to place FIJA Materials in a newsrack, it would be because of the *content*. Instead, the Superior Court ordered all newsracks removed in an effort to disguise a content-based regulation of political speech.

Another interesting point not addressed by the Ninth Circuit is that General Order No. 2-14-94 purports to be enforcing the City of San Diego's Newsrack Ordinance ("Newsrack Ordinance"). (p. 37a, *infra.*) By issuing General Order 2-14-94, the Superior Court exercised a power that was placed *exclusively* in the executive branch of the City of San Diego. Specifically, section 62.1007 of the Newsrack Ordinance places *enforcement* power within the San Diego City Manager not the Superior Court (p. 44a, *infra*):

> "§ 62.1007 Enforcement: Upon a determination by the *City Manager* that a newsrack has been installed, used or maintained in violation of any provisions of this division, *he shall cause an order to be issued* . . ."

Consequently, we are presented with a Superior Court that not only acted without conducting a public hearing but also without any power.

The Ninth Circuit cited this Court's decision in *Ward* as authority for upholding General Order No. 2-14-94.

At issue in *Ward* was the constitutionality of a New York City regulatory scheme that controlled the volume of musical performances at the Naumberg Acoustic Bandshell ("Bandshell") located in Central Park (the "Park"). The case arose from rock concerts held in the Bandshell, which caused disturbances in nearby neighborhoods. After detailed discussions and research of the acoustical problems with the Bandshell, New York enacted a comprehensive regulatory scheme, which included provisions that New York provide: (1) high quality sound equipment for all performances; and (2) an independent, experienced sound technician to control the volume of all performances.

Rock Against Racism ("RAR") objected to having New York provide a technician and sued in federal court. RAR contended that the regulations interfered with their artistic judgment.

This Court granted certiorari in *Ward* and clarified the rule concerning time, place, or manner restrictions on protected speech:

> "Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so . . . The government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goal."

*Ward*, 491 U.S. at 798-799.

As set forth above in this section, petitioners contend that General Order No. 2-14-94 is a *content-based* regulation that was designed to prevent distribution of FIJA Materials in newsracks in a traditional public forum. Thus, the Ninth Circuit's reliance on *Ward* is misplaced because that case applies only to content-*neutral* regulations.

Even assuming, *arguendo*, that General Order No. 2-14-94 is content-neutral, the facts of the case before the Court demonstrate that respondents did not comply with the rule announced in *Ward*.

First, in *Ward*, New York went through a legislative process that resulted in a comprehensive regulatory scheme. In the case before the Court, there were no public hearings, no presentation of evidence, and no presentation of opposing views of those concerned. In short, there was no legislative process.

Second, in *Ward*, New York was exercising its police powers to enact the regulations to control noise levels. In the case before the Court, the Superior Court was enforcing San Diego's Newsrack Ordinance, which placed all *enforcement* power not in the Superior Court but in the City Manager.

Third, in *Ward*, New York went to great pains to insure that artistic autonomy was secured. In the case before the Court, there was no thought given to securing the First Amendment rights of petitioner Liberty or other print media organizations. The Superior Court did not even attempt to explain *how* the newsracks were presenting a danger to the security around the courthouse.

Fourth, in *Ward*, New York worked directly with performers in order to insure that the noise level problem would be resolved and that artistic judgment would not be compromised. In the case before the Court, no meetings were held with petitioners or members of the print media; nor were any comments solicited from petitioners or other members of the print media prior to or after the issuance of General Order No. 2-14-94;[7] nor were any

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[7] As an aside, the Superior Court always requests comments from the legal community *before* implementing changes to local court rules.

accommodations made to petitioners or the print media regarding placement or relocation of their newsracks.

Finally, in *Ward*, New York clearly identified the significant governmental interest (i.e., protecting its citizens from unwelcome noise) and connected that interest with actual noise problems at the Bandshell. In the case before the Court, the Superior Court merely asserts the interest but does not connect it to any actual problems created by the newsracks. No evidence was presented by respondents, nor does any appear in the record, that demonstrates that the newsracks were a danger to the courthouse.[8]

Petitioners believe that General Order 2-14-94 is an unconstitutional content-based regulation of political speech and the press in a traditional public forum. Alternatively, petitioners contend that General Order No. 2-14-94 is an unconstitutional time, place, or manner regulation of political speech and the press in a traditional public forum. Accordingly, petitioners respectfully request the Court to grant their petition to consider Questions 2 and 3.

## CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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May 21, 1996

[8] Petitioners do not mean to say that the Superior Court does not have a significant interest in maintaining a secure area around the courthouse but rather that the Superior Court has failed to present any evidence that *proves* the newsracks created any danger.

# APPENDICES

**APPENDIX A**

[Filed Feb. 23, 1996]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 95-55121

D.C. No. CV-94-01156-GT

FULLY INFORMED JURY ASSOCIATION; CAL-FIJA; LIBERTY LOBBY, INC.; DAVE CADWAY; JIM HARNSBERGER,
*Plaintiffs-Appellants,*

v.

COUNTY OF SAN DIEGO; CITY OF SAN DIEGO; MICHAEL SGOBBA, San Diego Marshal; JERRY SANDERS, Chief of Police, San Diego Chief of Police; JIM ROACH, San Diego County Sheriff,
*Defendants-Appellees.*

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Appeal from the United States District Court
for the Southern District of California
Gordon Thompson, Jr., District Judge, Presiding

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Argued and Submitted October 17, 1995
Pasadena, California

## MEMORANDUM*

Before: POOLE and O'SCANNLAIN, Circuit Judges, MARQUEZ, District Judge.**

Appellants appeal from the district court's denial of their motion for preliminary injunctive relief in their 42 U.S.C. § 1983 action challenging the constitutionality of two general orders issued by the San Diego Superior Court. We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) and affirm the judgment of the district court.

The first regulation, General Order 102093, prohibits

> [t]he distribution or attempted distribution of any written materials tending to influence, interfere or impede the lawful discharge of the duties of a trial juror, and communication or attempt so to communicate with any person summoned, drawn, or serving as a trial juror in these courts for purposes of so influencing, interfering, or impeding the lawful discharge of the duties of a trial juror in or within 50 yards of any public entrance to the facilities within which Courts conduct jury trials within this County.

Even assuming this is a content-based restriction on political speech in a public forum, and so entitled to the most exacting scrutiny, we find that the regulation is necessary to serve the state's compelling interest in protecting the integrity of the jury system and is narrowly drawn to achieve that end. Therefore, the regulation survives appellants' First Amendment challenge. *See Bur-*

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*** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.**

**** The Honorable Alfredo C. Marquez, United States Senior District Judge for the District of Arizona, sitting by designation.**

*son v. Freeman*, 504 U.S. 191, 198-200 (1992); *Cox v. Louisiana*, 379 U.S. 559, 562 (1965).

The second regulation, General Order 2-14-94, ordered all

> vendors and distributors of newspapers distributed from newsracks currently placed on the sidewalk bordering the front entrance of the San Diego County Courthouse [to] remove said newsracks to another location within two weeks.

This content neutral regulation is narrowly tailored to further the significant state interest in securing the area around the courthouse and leaves open ample alternative channels for communication of the information, and so too passes constitutional muster. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791, 796-99 (1989).

Both challenged regulations are thus proper exercises of a court's inherent authority to take supervisory and administrative actions necessary to implement its judicial functions. Because we agree that appellants failed to show any likelihood of success on the merits of their constitutional claims, and because the record reveals that they delayed seeking injunctive relief, we conclude that the district court did not abuse its discretion in denying injunctive relief. Accordingly, the judgment of the district court is AFFIRMED.

## APPENDIX B

[Filed Oct. 31, 1994]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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Civ. No. 94-1156 GT (AJB)

FULLY INFORMED JURY ASSOC., *et al.*,
*Plaintiffs,*

v.

COUNTY OF SAN DIEGO, *et al.*,
*Defendants.*

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## ORDER

On Monday, October 11, 1994 the defendants in the above-captioned case brought on for hearing their motion to dismiss plaintiffs' complaint for violation of plaintiffs' constitutional and civil rights. The Court has fully considered this matter, the papers timely submitted by the plaintiff, and the authorities and arguments cited therein. Also on Monday, October 11, 1994, plaintiffs brought on for hearing their Motion for Preliminary Injunction enjoining the enforcement of General Orders 102093 and 2-14-94, San Diego Municipal Code sections 62.1001-62.1013, and to compel the return of plaintiffs' newsrack. The Court has reviewed the memorandum of points and authorities, the declarations and the exhibits lodged in support of the application.

## BACKGROUND

Plaintiffs in this case are Jim Harnsberger, the Fully Informed Jury Association ("FIJA") and persons or

entities affiliated with them.[1] Plaintiffs advocate the "fully informed jury system," which is essentially a political principle under which juries would serve as judge of both law and fact in criminal cases. Plaintiffs also advocate "jury nullification," which encourages jurors to disregard the law in criminal cases where they feel to follow the law would lead to an unfair result. Plaintiffs' activities include the distribution of newsletters, information regarding their views, demonstrating, and lobbying state legislatures to pass a "Jury Bill of Rights."

Plaintiffs filed a complaint seeking a variety of relief, including injunctive relief and money damages, for alleged violations of their rights under the First and Fourteenth Amendments of the United States Constitution, and similar state rights. Plaintiffs also seek relief for violation of civil rights pursuant to 42 U.S.C. section 1983. Plaintiffs challenge the constitutionality of two General Orders issued by San Diego courts, as well as the constitutionality of San Diego Municipal Code sections 62.1001-62.1013, the city's newsrack ordinance (the "Ordinance"). Plaintiffs also assert that the City of San Diego (the "City") and County of San Diego (the "County") violated their rights with regard to Plaintiffs' demonstrations at and around various City and County buildings.

The complaint alleges that the City of San Diego, the County of San Diego, and various individuals and law enforcement departments violated Plaintiffs' rights by preventing them from distributing material at and around various City and County buildings. Specifically, Plaintiffs allege that on three separate occasions when they were demonstrating in front of the County Administration Building, and on three separate occasions when they were demonstrating in front of the San Diego City Hall, an individual came out and identified himself as County

[1] The other plaintiffs in this action are CAL-FIJA (the California affiliate of FIJA), Liberty Lobby, Inc. and Dave Cadway.

Administration Building or City Hall security, and threatened to call the police if the demonstrators did not cease demonstrating and disperse.

Additionally, the complaint alleges that General Order 102093, issued by the County courts in October of 1993 violates Plaintiffs' rights. General Order 102093 states:

> The distribution or attempted distribution of any written materials tending to influence, interfere or impede the lawful discharge of the duties of a trial juror, and communication or attempt so to communicate with any person summoned, drawn or serving as a trial juror in these courts for purposes of so influencing, interfering or impeding the lawful discharge of the duties of a trial juror, in or within 50 yards of any public entrance to the facilities within which Courts conduct jury trials within this County is prohibited.
>
> Disobedience of this General Order is punishable as a contempt of court.

The preamble to General Order 102093 observes that "[w]ritten materials are being distributed and handed to persons entering facilities in San Diego County within which Courts conduct jury trials" with an intent to influence them. The preamble also observes that "[t]he right to trial by jury according to law is fundamental to the lawful and orderly administration of justice." Plaintiff Jim Harnsberger violated this General Order, was advised of his violation and shown a copy of the Order. Marshals arrested Harnsberger after he refused to desist his distribution of violative materials. Harnsberger underwent a trial by jury for criminal contempt, was convicted, and served five days in jail and paid a fine.

The complaint further alleges violation of Plaintiffs' rights due to the removal of all newsracks from in front of the San Diego County Courthouse pursuant to General Order 2-14-94, issued by the Presiding Judge of the Su-

perior Court of San Diego. Plaintiffs had previously distributed FIJA materials via a newsrack in front of the Courthouse. General Order 2-14-94 commands that all

> [v]endors and distributors of newspapers distributed from newsracks currently placed on the sidewalk bordering the front entrance of the San Diego County Courthouse [to] remove said newsracks to another location [within two weeks from the date of the order].

The preamble of the Order discusses how the many varied newsracks interfere with safe passage to and from the courthouse, cause clutter and congestion, and "detract from the dignity and appearance of San Diego's main House of Justice." Plaintiffs' newsrack, along with several others, was cleared from in front of the Courthouse pursuant to the General Order after Plaintiffs failed to remove it. Plaintiffs also allege the constitutionality of the City's newsrack ordinance on its face and as applied.

Plaintiffs have moved that preliminary injunctions issue against the enforcement of the General Orders and the Ordinance. Plaintiffs have also requested a preliminary injunction to compel Defendants to return to Plaintiffs the newsrack cleared away from in front of the Courthouse pursuant to General Order 2-14-94.

Defendants City of San Diego and Police Chief Sanders have requested a motion to dismiss for failure to state a claim pursuant to the Federal Rules of Civil Procedure, Rule 12(b)(6). In the alternative, they seek a motion for more definite statement pursuant to Rule 12(e). For the reasons set forth below, Plaintiffs' various requests for injunctive relief are denied, and Defendants' motion to dismiss is granted. The motion is granted with prejudice as to all claims save for the demonstration claims. Plaintiffs shall have 30 days leave to amend as to these claims from the date this Order is filed.

## DISCUSSION

### I. Defendants' Motion to Dismiss

Defendants' motion to dismiss for failure to state a claim under FRCP Rule 12(b)(6) is granted for two reasons.

First, Plaintiff's failure to file opposition papers within the time limits clearly set forth in Southern District Local Rule 7.1(e)(2) may be considered by this Court to be a waiver, granting consent to the motion pursuant to Local Rule 7.1(f)(3).

Second, even if this court considers the complaint on the merits dismissal is still proper. Dismissal under FRCP Rule 12(b)(6) is proper where there is either: (1) a lack of cognizable legal theory; or (2) the absence of sufficient facts alleged under a cognizable theory. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). At present, the complaint fails to allege any action on the part of the City or Police Chief Sanders at all, much less any action violative of Plaintiffs' constitutional and civil rights. The only mention of the police in the complaint is where FIJA demonstrators were allegedly told to disperse or the police would be called. There is no mention of the police actually arriving on the scene or doing anything to the demonstrators. Nor is there any mention that the demonstrators ceased their activities.

With regard to the City, there is no allegation that it had anything to do with either the issuance or enforcement of General Order 2-14-94, ordering the removal of all newsracks from in front of the San Diego County Courthouse, much less the actual removal itself. As to the allegation that the City's newsrack ordinance is unconstitutional on its face as applied, the *General Order*, with which the City and Police had nothing to do, was applied to remove the newsracks, not the City Ordinance. In any event, the sweeping assertion that the City's news-

rack ordinance is unconstitutional is merely a conclusory allegation and legal characterization of the ordinance. Because it is this Court's function to interpret statutes and not that of Plaintiffs, this Court need not accept Plaintiffs' characterization of the ordinance, even at the pleading stage. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). In fact, as discussed below in section II, both the newsrack ordinance and General Order 2-14-94 are constitutional. Therefore, Plaintiffs will have failed to assert any legally cognizable theory against the City and the Police Chief even if the complaint is amended.

As for General Order 102093, the complaint contains no allegations that either the City or the Police Chief had anything to do with its generation or enforcement. Plaintiff Harnsberger was arrested by County Marshals, not City Police, for violating the Order, and underwent a trial for criminal contempt. As discussed below, General order 102093 is constitutional.

It is appropriate for a court to grant a motion to dismiss with prejudice where "allegations of other facts consistent with the challenged pleading could not possibly cure the defect." *Schreiber Dist. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1402 (9th Cir. 1986). Such is the case here. Because the Orders and the newsrack ordinance are constitutional, even if Plaintiffs amend their complaint to allege that the City or the police were involved in the creation of or took some action pursuant to the Orders or the ordinance, Plaintiffs will have failed to assert any legally cognizable theory against either the City or the Police Chief. Therefore, the Court grants Defendants' motion to dismiss with prejudice as to the claims dealing with the General Orders and the newsrack ordinance.

However, there remains the matters of the demonstrations in front of City Hall and the County Administration buildings. For the purposes of deciding whether to grant

a 12(b)(6) motion to dismiss for failure to state a claim, a court must accept as true all material allegations in the complaint, as well as reasonable inference to be drawn from them. *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The complaint merely alleges that someone came out of City Hall and the County Administration Building, identified himself as security, and ordered the FIJA demonstrators to cease demonstrating and disperse or he would call the police. In addition, even assuming that a *mere threat* to call the police by a City employee if demonstrators do not cease their speech and disperse is violative of free speech and assembly rights, the complaint does not allege that either individual was a City employee. Further, for purposes of a section 1983 action, Plaintiffs must allege that any violation of their civil rights took place pursuant to some ordinance or official policy. 42 U.S.C. section 1983. Plaintiffs have failed to do so. Finally, Plaintiffs have failed to allege that there was in fact any police intervention whatsoever.

In theory, as to the demonstration claims, the complaint could be amended so as to state a claim against the Defendants. In addition, the Court takes notes to FRCP Rule 15(a), which allows claimants one chance to amend their complaint before defendants file an answer. No answer has been filed as of yet in this case.[2] Indeed, as a practical matter, leave to amend is almost always granted by courts. *Allen v. Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990). Therefore, although this Court grants Defendants' motion to dismiss with prejudice as to the General Order and newsrack ordinance claims, the Court grants the motion to dismiss with 30 days leave to amend as to the demonstration claims.

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[2] Defendants' memoranda of points and authorities in opposition to the Plaintiffs' Application for a Preliminary Injunction do not constitute responsive pleadings. Therefore, they do not bar the operation of FRCP Rule 15(a).

## II. Plaintiffs' Application for Preliminary Injunction

The Plaintiffs' application for preliminary injunctions against the enforcement of the General Orders and the newsrack ordinance are denied. Similarly, the request for an injunction to compel the return of the newsrack is denied.

### (a) Res judicata and the constitutionality of General Order 102093

The principle of res judicata prevents Plaintiffs [3] from relitigating the constitutionality of General Order 102093, because the issue has already been fully and finally litigated at the state level.

In the contempt proceedings before the San Diego Superior Court with regard to Harnsberger's violation of General Order 102093, Harnsberger challenged the constitutionality of that Order on First Amendment grounds, among others.[4] The Superior Court expressly considered and rejected Harnsberger's arguments, and found that "General Order 102093 is a valid, legal and enforceable

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[3] Although the contempt proceedings was brought only against Harnsberger, the remaining plaintiffs assert claims so similar to his as to border on near identity. Plaintiffs' complaint makes virtually no distinction between the various plaintiffs' claims. As such, all plaintiffs are in privity with Harnsberger. *See, e.g., Headly v. Bacon,* 828 F.2d 1272, 1276-77 (9th Cir. 1990). Therefore, the judgment against Mr. Harnsberger binds all parties as if they had been parties to the action. *Id.*

[4] In his Memorandum of Points and Authorities in Support of Demurrer to Order to Show Cause, Plaintiff Harnsberger vaguely asserted that the Order was unconstitutional as a violation of his First Amendment rights. He also asserted that the Order violated the equal protection clause of the Fourteenth Amendment of the federal Constitution, as well as the due process clause of the California State Constitution. County's Mem. of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction ("County's opposition papers"), attaching Harnsberger's Memorandum.

order." (Minute Order of San Diego Superior Court, December 9, 1993; County's opposition papers citing Martne decl. as exhs. 2 and 3, attaching transcript of hearing at 25:19-20.) Harnsberger filed a writ to challenge the Superior Court's decision. The Court of Appeal for the State of California (Case DO20474) denied his writ by order dated February 14, 1994, and the California Supreme Court (Case SO38178) denied his petition for review by minute order dated March 31, 1994.

Valid final judgments rendered by state courts preclude the relitigation of previously decided issues in a federal forum to the same extent they would preclude further state litigation. *West Coast Theatre Corp. v. City of Portland*, 897 F.2d 1519, 1525 (9th Cir. 1990). Plaintiffs are precluded from further litigating the constitutionality of General Order 102093 in state court because a valid, final conviction in a criminal proceeding [5] is res judicata in subsequent litigation involving the same parties on the same issue. *Leader v. California*, 182 Cal. App. 3d 1079, 1087 (1986). Under *Leader*, this criminal conviction fairly binds Plaintiffs in this subsequent civil litigation, because, as that case requires, Harnsberger was convicted of a "serious" offense,[6] received a full and fair trial, and because the state courts necessarily determined the constitutionality of General Order 102093, the issue on which the prior conviction is offered, in the contempt trial. *Id.* at 1087. Therefore, Plaintiffs' action with regard to General Order 102093 before this Court

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[5] Under California law, contempt is a quasi-criminal proceeding requiring proof beyond a reasonable doubt. *Gibson v. Gibson*, 15 Cal. App. 3d 943, 948 (1971). The Superior Court determined that Harnsberger was in contempt by proof beyond a reasonable doubt. Transc. of hearing at 27:17, in support of County's opposition papers.

[6] Under California law, "any offense punishable by imprisonment should be considered a serious offense." *Leader*, 182 Cal. App. 3d at 1087. Harnsberger served 5 days in jail for criminal contempt, and therefore committed a serious offense.

is barred by the prior final judgment of the state court system, even though Plaintiffs bring the present action pursuant to federal law and under the federal constitution. *Allen v. McCurry*, 449 U.S. 90, 103-104 (1980) (preclusive effect of state court judgment applies even in an action brought under 42 U.S.C. section 1983). Even if the principles of res judicata did not apply to General Order 102093, the request for injunctive relief should nonetheless be denied because that Order is constitutional.

(b) Standard for granting a preliminary injunction

Courts usually consider four factors in determining whether to grant a preliminary injunction or. These factors are: (1) the likelihood of a plaintiff's merits on the success; (2) the possibility of plaintiff suffering irreparable injury if relief is not granted; (3) the extent to which the balance of hardships favors the respective parties; and (4) in certain cases, whether public interest will be advanced by providing preliminary relief. *United States v. Odessa Union Warehouse Co-op.*, 833 F.2d 172, 174 (9th Cir. 1987). To obtain a preliminary injunction the moving party must show either: (1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in the moving party's favor. *Id.* These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the possibility of success decreases. *Id.*

In this case, Plaintiffs have a possibility of success approaching zero, because, as discussed below, the challenged Orders and the newsrack ordinance all appear to be constitutional. Therefore, Plaintiffs are required to show a high degree of irreparable harm in order for this Court to grant injunctive relief. As discussed further below, Plaintiffs have failed to meet this burden in large

part because their great delay (4 months) in seeking injunctive relief indicates that they have not and will not suffer "irreparable harm." Because the Orders and the Ordinance are constitutional, and because Plaintiffs have not and will not suffer irreparable harm should injunctive relief be denied, the Court denies Plaintiffs' request for injunctive relief preventing enforcement of the Orders and the newsrack ordinance.

(c) General Orders 102093 and 2-14-94 are constitutional

Both of the General Orders at issue in this case are constitutionally permissible place and manner restrictions on speech. To the extent that General Order 102093 is content based, it is narrowly tailored to vindicate the substantial state interest of the fair administration of justice, allows reasonable alternatives for expression, and is therefore constitutional. General Order 2-14-94 is an unquestionably neutral place and manner restriction on speech.

(1) The courts have the inherent power to issue such Orders.

Plaintiffs initially attack the Orders on the grounds that the issuing courts lacked the jurisdiction to issue them, and suggests that the exercise of judicial power in this case violated the separation of powers doctrine. Plaintiffs' argument is misguided to say the least. Generations of California courts have recognized the legitimate exercise of the "inherent power" of the courts to make and enforce rules affecting the administration of justice. *See Nicholl v. Koster*, 157 Cal. 416, 423 (1910) (regarding the appointment of probation officers, stating, "[a]cts necessary to be done to enable a court to transact its judicial work in an orderly and expeditious manner, or necessary or even merely convenient to the exercise of its jurisdiction, has always been recognized as a power incidental to judicial office."); *Millholen v. Riley*, 211

Cal. 29, 33 (1930) (noting that a court is inherently vested with "the power of self-preservation, indeed, the power to remove all obstructions to its successful and convenient operation."); *Walker v. Superior Court*, 53 Cal. 3d 257, 266-67 (1991) (recognizing the inherent powers of courts to take those actions they deem necessary for the proper exercise of judicial functions). The courts clearly possessed the authority to enact the General Orders at issue here, both of which facilitate the administration of justice and enable the courts to transact their judicial work in an orderly and judicious manner.

(i) General Order 2-14-94

General Order 2-14-94 is a content-neutral place and manner restriction that is narrowly tailored to further a significant state interest, and is therefore constitutional. General order 2-14-94 issued by the Superior Court ordered the removal of all "newsracks currently placed on the sidewalk bordering the front entrance of the San Diego Courthouse." The Order is expressly premised on providing "safe ingress and egress" by the public, avoiding "additional and unaccepted security risks," avoiding "clutter and congestion" in front of the building and preserving the "dignity and appearance" of the County Courthouse. There are no exceptions for particular vendors or distributors under the General Order. *All newsracks, distributors, viewpoints, and publications are treated equally.* The United States Supreme Court held in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) that:

> [E]ven in a public forum the government may impose reasonable restrictions on the time, place or manner of the protected speech, provided the restrictions are justified without reference to the content of the regulated speech [i.e., the restrictions are content-neutral], that they are narrowly tailored to serve a significant governmental interest, and that they

> leave open ample alternative channels for communication of the information.

*Id.* at 675.

General Order 2-14-94 applies to all newsrack distributors and vendors without regard to the content of the materials housed in the newsracks, and is therefore content neutral. Further, the Order leaves open ample alternative channels for communication of the information because the Order applies only to all of those newsracks on the sidewalk bordering the front entrance to the courthouse. Vendors and distributors are free to move their newsracks virtually anywhere else.

Finally, the Order is narrowly tailored to serve a significant governmental interest. A regulation is considered narrowly tailored so long as "it promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799. The entrance to the courthouse is the gateway to a special institution. *See Cox v. Louisiana*, 379 U.S. 559, 562 (1965). Safe public access to the courthouse, as well as its dignity and appearance are significant governmental interests, and are less effectively achieved in the absence of the universal ban on newsracks in front of the courthouse. Therefore, General Order 2-14-94 is a valid place and manner restriction under applicable first amendment principles.

(ii) General Order 102093

General Order 102093 is also a valid place and manner restriction under applicable first amendment principles. Like General Order 2-14-94, General Order 102093 is content neutral. General Order 102093 prohibits:

> [t]he distribution or attempted distribution of any written materials tending to influence, interfere or impede the lawful discharge of the duties of a trial juror, and communication or attempt so to com-

> municate with any person summoned, drawn or serving as a trial juror in these courts for purposes of so influencing, interfering or impeding the lawful discharge of the duties of a trial juror, in or within 50 yards of any public entrance to the facilities within which Courts conduct jury trials within this County. . . .

General Order 102093 is directed at the secondary effects of speech rather than the content of speech. The Order permits everyone, including the plaintiffs to say or distribute whatever they like in front of courthouses, so long as the communication does not "influence, interfere or impede the lawful discharge of the duties of a trial juror." The Order's intention is to preserve the integrity of the jury system, and is unrelated to content. *See Boos v. Barry,* 485 U.S. 312, 320 (1988) (restriction is content neutral if justified without reference to content).

Even if the Order is considered content based, it is nonetheless constitutionally permissible because it is narrowly drawn to achieve a compelling governmental interest. A content based restriction on political speech in a public forum is not necessarily prohibited under the first amendment, but is subject to strict scrutiny. *Boos,* 485 U.S. at 321. The integrity of the judicial system is certainly a compelling governmental interest.

> There can be no question that a State has a legitimate interest in protecting its judicial system from the pressures which [first amendment activities] near a courthouse might create. Since we are committed to a government of laws and not men, it is of the utmost importance that the administration of justice be absolutely fair and orderly. . . . [T]he untrammeled functioning of our courts is part of the very foundation of out constitutional democracy. . . . A state may adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence.

*Cox*, 379 U.S. at 562. The integrity of the jury system is vital to the judicial system, and materials and communication that tend to interfere with a juror's lawful discharge of his or her duties necessarily casts doubt on the ultimate decision reached by that juror. Indeed, the end result of jury nullification, instructing the jury that it may disregard the law, is anarchy. *United States v. Dougherty*, 473 F.2d 1113, 1133 (D.C.Cir. 1972).

General Order 102093 is narrowly drawn to achieve the state's interest in protecting the administration of justice. It is directed only at those expressive activities "tending to influence, interfere or impede the lawful discharge" of a juror's duties. These limitations are only imposed within a very limited physical area, "in or within 50 yards" of the courthouse entrance. In fact, this Order is narrower than the statute upheld in *Cox v. Louisiana*, that proscribes "interfering with, obstructing or impeding the administration of justice, or with the intent of influencing any judge, juror, witness or court officer . . . in or near" a courthouse. Plaintiffs may advocate their message anywhere else in town, including across the street from the courthouse or on the sidewalks adjacent to the courthouse, but more than 50 yards from the door. Plaintiffs have ample alternatives to express their views. Therefore, even if General Order 102093 is content based, it is constitutionally proper because it serves a compelling governmental interest and is narrowly drawn to achieve that end.

(d) The newsrack ordinance is constitutional

The application for a preliminary injunction against the enforcement of the newsrack ordinance is frivolous. The newsracks in front of the County Courthouse were removed pursuant to General Order 2-14-94, not pursuant to San Diego Municipal Code sections 62.1001-62.1013. Plaintiffs have failed to show how they have been in any way harmed by the newsrack ordinance. In contrast, the

City of San Diego and the public interest will be greatly harmed if the City is enjoined from enforcing its newsrack ordinance. Without regulation, newsracks could be placed throughout the City without regard to traffic and/or pedestrian safety, or aesthetics. At any rate, the ordinance is a constitutionally permissible place and manner restriction on communicative activity. A review of the ordinance reveals that its provisions and prohibitions apply to all vendors and distributors, and are narrowly tailored for the purpose of securing public safety and the general welfare of persons in San Diego, both of which are substantial governmental interests. *Plain Dealer Pub. Co. v. City of Lakewood*, 794 F.2d 1139, 1147 (6th Cir. 1986). The ordinance is clearly constitutional.

(e) Failure to show irreparable harm

The Plaintiffs have failed to show that they will suffer irreparable harm in the absence of a preliminary injunction. The basis for injunctive relief in federal court has always been irreparable injury and the inadequacy of available legal remedies. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). The point of granting injunctive relief is to preserve the *status quo* pending a determination on the merits. *Chalk v. U.S. District Court Cent. Dist. of California*, 840 F.2d 701, 704 (9th Cir. 1988). Where there is a long delay before seeking relief, the delay can be evidence that any detrimental effects have already occurred, making injunctive relief unnecessary. *Eisenberg, Etc. v. Wellington Hall Nursing Home*, 651 F.2d 902, 907 (3rd. Cir. 1981). Aside from the fact that the General Orders are constitutionally permissible, as well as the fact that the newsrack ordinance is both irrelevant to these proceedings and at any rate constitutionally permissible, Plaintiffs waited until July of 1994 to file their complaint and request injunctive relief. This request came four months after the removal of the newsracks in March of 1994, five months after General Order

2-14-94 went into effect, and nine months after General Order 102093 went into effect. Such a delay constitutes a lack of urgency and demonstrates a lack of irreparable harm to Plaintiffs. Therefore, their request for injunctive relief is denied.

(f) Plaintiffs are not entitled to injunctive relief as to the non-returned newsrack

Plaintiffs rather quizzically request this Court to compel Defendants in this action to return the newsrack removed from in front of the Courthouse to the Plaintiffs. Plaintiffs' newsrack was removed from in front of the County Courthouse pursuant to the constitutionally valid General Order 2-14-94 in March, after two weeks warning had been given to vendors. Plaintiff's request for a mandatory injunction to compel the return of the newsrack is denied, because they have failed to show that they are without an adequate legal remedy.[7]

IT IS ORDERED that

(1) Defendant's motion to dismiss for failure to state a claim is GRANTED with prejudice in part and without prejudice in part, with 30 days leave to amend as to the demonstration claims which have been dismissed without prejudice, the 30 days to commence from the date this Order is filed.

(2) Plaintiffs' Application for a Preliminary Injunction is DENIED.

IT IS SO ORDERED.

/s/ Gordon Thompson, Jr.
GORDON THOMPSON, JR.
United States District Judge

date October 30, 1994

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[7] Plaintiffs have shown no reason why they cannot seek money damages if they feel their newsrack has been subject to either conversion or trespass to chattels.

**APPENDIX C**

[Oct. 22, 1993]

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

MUNICIPAL COURT
OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO
San Diego Judicial District
El Cajon Judicial District
South Bay Judicial District
North County Judicial District

GENERAL ORDER NO. 102093

WHEREAS: Written materials are being distributed and handed to persons entering facilities in San Diego County within which Courts conduct jury trials;

WHEREAS: These written materials advocate jury nullification, a doctrine contrary to law;

WHEREAS: These written materials are being distributed with the intent to influence trial jurors and potential trial jurors, interfering with their obligation to discharge their duties as jurors;

WHEREAS: The distribution of these written materials interferes with and obstructs the lawful administration of justice;

WHEREAS: The right to trial by jury according to law is fundamental to the lawful and orderly administration of justice;

THEREFORE:

IT IS ORDERED:

The distribution or attempted distribution of any written materials tending to influence, interfere or impede

the lawful discharge of the duties of a trial juror, and communication or attempt so to communicate with any person summoned, drawn or serving as a trial juror in these courts for purposes of so influencing, interfering or impeding the lawful discharge of the duties of a trial juror, in or within 50 yards of any public entrance to the facilities within which Courts conduct jury trials within this County is prohibited.

Disobedience of this General Order is punishable as a contempt of court.

Dated: 10/20/93

/s/ [Illegible]
Superior Court Presiding Judge

/s/ [Illegible]
San Diego Judicial District
Presiding Judge

/s/ [Illegible]
El Cajon Judicial District
Presiding Judge

/s/ [Illegible]
South Bay Judicial District
Presiding Judge

/s/ [Illegible]
North County Judicial District
Presiding Judge

## APPENDIX D

[Filed Feb. 14, 1994]

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

General Order Number 02-14-94

WHEREAS: The entrance to the San Diego County Courthouse at 220 W. Broadway is presently lined with more than 30 newspaper racks.

WHEREAS: The Courthouse occupies approximately three square city blocks and serves many thousands of persons each day.

WHEREAS: For reasons of security, public entry to the Courthouse is by way of a single, narrow entrance through which all persons having business in the courthouse must pass.

WHEREAS: The present location of said newsracks interferes with the safe ingress and egress of members of the public who must form lines on the Courthouse steps to pass through the Court's security system.

WHEREAS: The present location, condition and clutter of said newsracks pose additional and unacceptable security risks which would not exist if the entranceway were clear and unobstructed.

WHEREAS: The clutter and congestion of numerous disparate types of newsracks at certain locations in the public rights of way has been declared by the City of San Diego to be detrimental to the public safety, convenience and general welfare, pursuant to Municipal Code § 62:1006(a).

WHEREAS: The location, number and condition of said newsracks detract from the dignity and appearance of San Diego County's main House of Justice.

WHEREAS: The location, number and condition of said newsracks is not in compliance with applicable sections of the Municipal Code, including, but not limited to, Sections 62:1005(e)(8), 62:1005(b), 62:1004(d), 62:1004(e), 62:1010 and 62:1011.

WHEREAS: Removing these racks to the red curb at the front of the court house would interfere with passengers disembarking from automobiles and City buses and place the newsracks in possible non-compliance with Municipal Code § 62:1005(d) and 62:1005(d)(5).

WHEREAS: The Court acknowledges the importance of the lawful and unabridged exercise of freedom of the press and the right of access to a free press.

WHEREAS: There are well-trafficked, alternative locations, including locations on sidewalks adjacent to the Courthouse entrance, such as those parallel to Union and Front Streets, which would afford vendors an opportunity to continue to serve the reading public.

THEREFORE:

The vendors and distributors of newspapers distributed from newsracks currently placed on the sidewalk bordering the front entrance of the San Diego County Courthouse at 220 West Broadway, San Diego, California, 92104, shall remove said newsracks to another location by no later than 5:00 p.m. on March 1, 1994. Any vendors and distributors who have not indicated their compliance with this order by timely removal of said newsracks, are further ordered to show cause for such non-compliance on March 5, 1994 at 9:00 a.m. in Department One of Superior Court.

IT IS SO ORDERED:

DATED: Feb. 14, 1994

/s/ James R. Milliken
JAMES R. MILLIKEN
Presiding Judge
Superior Court

## APPENDIX E

## UNITED STATES DISTRICT COURT
## SOUTHERN DISTRICT OF CALIFORNIA

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Case No. 94-1156 GT (AJB)

FULLY INFORMED JURY ASSOCIATION, CAL-FIJA, LIBERTY LOBBY, INC., DAVE CADWAY, and JIM HARNSBERGER,

*Plaintiffs,*

v.

COUNTY OF SAN DIEGO; CITY OF SAN DIEGO; MICHAEL SGOBBA, SAN DIEGO MARSHALL; JERRY SANDERS, SAN DIEGO CHIEF OF POLICE; JIM ROACH, SAN DIEGO COUNTY SHERIFF; SAN DIEGO COUNTY SUPERIOR COURT; SAN DIEGO COUNTY MUNICIPAL COURT, SAN DIEGO JUDICIAL DISTRICT; SAN DIEGO COUNTY MUNICIPAL COURT, EL CAJON JUDICIAL DISTRICT; SAN DIEGO COUNTY MUNICIPAL COURT, SOUTH BAY JUDICIAL DISTRICT; SAN DIEGO COUNTY MUNICIPAL COURT, NORTH COUNTY JUDICIAL DISTRICT; and DOES 1 through 50, inclusive,

*Defendants.*

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## DECLARATION OF JIM HARNSBERGER IN SUPPORT OF TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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I, Jim Harnsberger, do declare the following facts:

1. That I am a plaintiff in this action and have personal knowledge of the herein stated matters, and, if called upon to do so, I could and would testify competently and accurately to the herein stated matters.

2. That plaintiff Fully Informed Jury Association ("FIJA") is a Montana non-profit association, which is tax exempt under Internal Revenue Code, § 501(c)(3). FIJA publishes and distributes, on a national level and for distribution to all state organizations, various kinds of informational materials (i.e., newsletters, books, tapes, leaflets, information kits, bumper stickers, etc.) concerning the principle of the fully informed jury system. Simply stated the fully informed jury system is the principle that in criminal cases the jury is the judge of the law and facts. I am involved and believe in the principle of the fully informed jury system.

3. That FIJA publishes and distributes a newspaper entitled "FIJActivist" and an information kit entitled "FIJA Jury Power Information Kit." FIJA is involved in providing assistance in public education programs, outreach programs, public service announcements, and information on lobbying efforts at the state and local levels.

4. That I am a member and the Executive Director and California State Coordinator of CAL-FIJA, an unincorporated California association. CAL-FIJA is approved to promote throughout the state all materials, educational programs, public service announcements, and various other activities from the national organization, FIJA.

5. That as Executive Director for California CAL-FIJA, I am responsible for the promotion of the political doctrine of the fully informed jury system, which adopts the proposition that the jury in a criminal case has the power to decide both fact and law. To that end I am responsible for legislative efforts for CAL-FIJA to promote: (1) the Jury Rights Bill; and (2) the Jury Compensation Act. The Jury Rights Bill, if passed, would require judges in a criminal case to inform members of the jury that they may decide both facts as well as the law in a criminal case any failure to so inform would be grounds for a mistrial. The Jury Compensation Act would provide for

a pay increase to trial jurors who have not had a raise in nearly twenty years, on the notion that such legislation would assist to encourage those called to serve, to serve on the jury.

6. That the national organization, FIJA, depends upon the organizational and promotional efforts of CAL-FIJA to promote the political philosophy of the jury being fully informed, and depends upon the state organization to assist in the general, wide and regular distribution of the "FIJAactivist", the "Jury Power Kit", and other printed materials from the national level, to the state level, and finally to the local chapter in each community.

7. That in California as executive director, I am responsible for recruiting new chapters throughout the state. To date I have organized thirty-four such chapters in California.

8. That I sit as a permanent member to the executive board of directors. CAL-FIJA has a news service that reports on legislative progress, and various events in the local arena. We currently have two news reporters with press passes issued in San Diego County who submit material for the local, state, and national organizations.

9. That CAL-FIJA is very involved in the political arena in that we sponsor a number of candidate forums during election time, provide question sheets and endorsements sheets to prospective candidates asking their position "for" or "against" the political proposition of the fully informed jury system. In addition, CAL-FIJA submits a Legislator Questionnaire regarding the fully informed jury. A true and correct copy of FIJA's Legislator Questionnaire is herewith lodged as Exhibit "N."

The principle of a fully informed jury has support in San Diego County. For example, the cities of Lemon Grove, Oceanside, San Marcos, and Vista support this principle and have shown their support by proclamation

of Jury Rights Day (collectively referred to as the "Proclamations"). True and correct copies of the Proclamations are herewith lodged and respectively marked as Exhibits "A" through "D," inclusive. In addition, the governors of the following states have recognized the jury's right to judge both the law and fact and have established September 5th as Jury Rights Day: Indiana, Texas, Utah, Iowa, Montana, Wisconsin, Nebraska, Kansas, Vermont, Pennsylvania, and New Jersey. True and correct copies of the governors' proclamations are herewith lodged and collectively marked as Exhibit "O."

10. That CAL-FIJA provides newspaper inserts for general, wide distribution in the public regarding fully informed juries and our political goals. We hold an annual convention in February of each year in California, the last of which was held in San Diego. In addition CAL-FIJA distributes a number of other materials such as the FIJActivist, Citizen's Rule Book (which contains copies of the Declaration of Independence, U.S. Constitution and Bill of Rights), FIJA TRUE/FALSE BROCHURE, JURY COMPENSATION ACT and JURY RIGHTS BILL flyer, Jury Power History brochure, proposed Jury Rights Bill, CAL-FIJA monthly invitation to our public townhall meeting, Fully Informed Jury Amendment, and the FIJA Jury Power Information Kit. These materials are herewith lodged as Exhibits "E" through "M," inclusive.

CAL-FIJA also publishes and distributes a local newsletter for the general public called the "CAL-FIJA ACTION TIMES," which is published every other month and is made available for the public at large.

11. That in addition to my other activity as State Coordinator, I am also the person responsible for coordinating efforts aimed at obtaining proclamations at the local, and state level that recognize September 5th as Jury Rights Day, the day in history in 1670 when a jury acquitted William Penn for practicing a religion in viola-

tion of the law, and being part of an unlawful assembly. The Founding Fathers drew from this case the important need for the many protections included within the First Amendment, and September 5th serves as the cornerstone of dates our organization recognizes.

12. That I am the official spokesman for the State CAL-FIJA organization. I do public speaking to many groups locally, and state wide. I give many speeches at public events in support of FIJA, and other groups we support where FIJA or CAL-FIJA has a related interest. I support the political theory of fully informed jury system, and as such, I organize, and take part in demonstrations in many public venues, including, but not limited to, federal courthouses, state capitol building, city halls, county buildings, local courthouses, fairs, conventions, and the like.

13. That in or about May, 1993, I, plaintiff Dave Cadway, and other members of CAL-FIJA began weekly distribution of the FIJA materials at the San Diego County Administration building, the San Diego City Hall building, all San Diego county courthouses, and other locations throughout the county of San Diego, including on several dates the federal building and federal courthouse on Front Street in San Diego. The federal courthouse building is the only place and the only location where myself or other members of CAL-FIJA have NOT been harassed or threatened by marshals, or U.S. Attorneys and judges.

14. That on June 24, 1993, I and other members of CAL-FIJA were at the San Diego County Administration Building distributing FIJA Materials in the parking lot, and positioned at the east entrance of the building passing out FIJA Materials to people who were entering or exiting the building. We were confronted by a man who identified himself as "security" for the building and demanded that we leave and not make any further distribution of materials or he would call police to arrest us.

15. That on September 17th and 29th and on October 14, 1993, I and other members of CAL-FIJA were again confronted by "security" at the county building and we were threatened with arrest and treated with harassment for our activity in the distribution of materials and public speaking.

16. That on August 31, 1993 I with other members of CAL-FIJA were at the City Hall for the City of San Diego distributing materials, making speeches, and carrying protest banners when were confronted by a man who said he was the "security" for the building. We were told we could not engage in this activity on city property and we would have to move to across the street. On September 17th and 29th and October 14, 1993, we were again at city hall and we were met with the same harassment and threats of arrest.

17. That I believe that because of the opposition of many leaders in the local government and in the San Diego courts to the political principal of full informed juries, I and my organization were issued a series of court orders that were designed to abridge our rights to freedom of speech, press, and assembly.

18. That on October 25, 1993, I and about twenty members of CAL-FIJA were at the county courthouse at 220 West Broadway where we were protesting, carrying signs, banners, and distributing FIJA Materials including our newspaper. I was approached by San Diego Marshall's deputies and informed of General Order 102093. I then continued my activity along with all members. I then was arrested, taken into the San Diego Courthouse, and cited for contempt and given an Order of Show Cause with a hearing date for violation of the court order. No one else was arrested even though they continued to distribute material in front of the San Diego Courthouse.

19. That between October 25, 1993, and February 14, 1994, I wrote several letters to the San Diego Superior

Court to inquire as to how I could obtain permission to distribute FIJA Materials outside and inside the courthouse. I also wanted to know how I could obtain permission to place a newsrack in front of the court building along with the thirty other newsracks already there. I indicated that if other newspapers were allowed to distribute their materials in the newsracks in front of the San Diego County Courthouse, then FIJA and CAL-FIJA should be given "equal footing" to distribute the FIJA Materials. At no time did I ever receive a response to my many letters. In addition to my many letters on this subject of permission, I made a personal visit to the clerk's office of the San Diego Superior Court to inquire as to how I could obtain permission to have FIJA Materials obtain "equal footing" with the many other publications and newsracks. Clerks at the Superior Court refused to discuss this issue with me.

20. That to determine the legitimate issuance of the newsrack order 2-14-94, I went around several locations near the San Diego Courthouse on May 27th and 29th, 1994, I took several photographs of other newsracks, which are placed on curbs in red zones, sometimes prohibited by the court order for safety. The following is a summary of each photograph (i.e., where such photograph was taken and what it depicts):

| Exhibit | Location | Description |
|---|---|---|
| P-1 | corner of Broadway and Front | newsracks in "red" zone |
| P-2 | 1350 Front Street State Building | newsracks in "red" zone |
| P-3 | corner of 1350 Front Street | newsrack in "red" zone |
| P-4 | corner of Front & A Streets | newsracks in "red" zone |
| P-5 | corner of West Broadway Front Street | newsracks in "red" zone |
| P-6 | corner of First and West | newsracks in "red" zone |
| P-7 | 200 block of Broadway | newsracks in "red" zone |
| P-8 | First and A Streets | newsrack in "red" zone |
| P-9 | Broadway and Front | newsrack in "red" zone |
| P-10 | First and Broadway | newsracks in "red" zone |

I also visited the San Diego County Courthouse and the El Cajon courthouse jury lounge on May 27, 1994. In the San Diego Courthouse I took a picture inside the lobby by the escalators, which shows that there are distribution shelves and newsracks inside the Courthouse. In the El Cajon Courthouse I took a series of photographs in the lounge area reserved for trial juror's. Those photographs make it clear that a number of political, editorial, and news magazines and a Webster's dictionary are available with no restriction to juror. The following is a summary of each photograph (i.e., where each photograph was taken and what it depicts):

| Exhibit | Location | Description |
|---|---|---|
| P-11 | El Cajon jury lounge | table in jury lounge with Union-Tribune newspaper and magazines |
| P-12 | El Cajon jury lounge | Webster's Dictionary on table in jury lounge |
| P-13 | El Cajon jury lounge | magazine rack in jury lounge |
| P-14 | San Diego County Court | distribution shelves and newsracks by escalator |

I declare under penalty of perjury pursuant to the laws of the State of California and United States of America that the foregoing is true and correct.

Dated: July 20, 1994

/s/ Jim Harnsberger
JIM HARNSBERGER

**APPENDIX F**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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Case No. 94-1156 GT (AJB)

FULLY INFORMED JURY ASSOCIATION, CAL-FIJA, LIBERTY LOBBY, INC., DAVE CADWAY, and JIM HARNSBERGER,

*Plaintiffs,*

v.

COUNTY OF SAN DIEGO; CITY OF SAN DIEGO; MICHAEL SGOBBA, SAN DIEGO MARSHALL; JERRY SANDERS, SAN DIEGO CHIEF OF POLICE; JIM ROACH, SAN DIEGO COUNTY SHERIFF; SAN DIEGO COUNTY SUPERIOR COURT; SAN DIEGO COUNTY MUNICIPAL COURT SAN DIEGO JUDICIAL DISTRICT; SAN DIEGO COUNTY MUNICIPAL COURT, EL CAJON JUDICIAL DISTRICT; SAN DIEGO COUNTY MUNICIPAL COURT, SOUTH BAY JUDICIAL DISTRICT; SAN DIEGO COUNTY MUNICIPAL COURT, NORTH COUNTY JUDICIAL DISTRICT; and DOES 1 through 50, inclusive,

*Defendants.*

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DECLARATION OF DAVE CADWAY IN SUPPORT OF TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I, DAVE CADWAY, declare:

1. I am a plaintiff and a member of CAL-FIJA, San Diego Chapter, and have personal knowledge of the herein stated matters, and, if called upon as a witness, could and would testify competently and accurately to the herein stated matters.

2. That Liberty Lobby, Inc. ("Liberty") is a non-profit corporation organized under the laws of Washington, D.C. Liberty publishes a weekly political newspaper entitled, THE SPOTLIGHT, which is distributed nationally, including San Diego County. I distribute THE SPOTLIGHT in San Diego.

3. That I am involved and believe in the political principle of the fully informed jury system. In this regard, I engage in speech and demonstrations, which include public protests and distribution of materials published by plaintiffs Fully Informed Jury Association ("FIJA") and CAL-FIJA.

4. That in or about May, 1993, until October 25, 1993, I was a participant in rallies, demonstrations, and protests by CAL-FIJA at local courthouse located in San Diego County.

5. That on October 25, 1993, I was involved in a demonstration at the San Diego County Courthouse when marshall's deputies apprised plaintiff Jim Harnsberger of GENERAL ORDER NO. 102093 and that he must stop distributing FIJA materials. Jim Harnsberger continued distributing FIJA Materials and was arrested for criminal contempt. No one else was arrested.

6. That as a consequence of General Order No. 102093 and Jim Harnsberger's arrest, I ceased all activity in participating in CAL-FIJA events that are located at or near any San Diego County courthouse because of fear of being arrested and convicted for distributing FIJA materials.

7. That on or about March 4, 1994, I was distributing that week's edition of THE SPOTLIGHT to newsracks in San Diego, when I was shocked to discover that the newsrack that contained THE SPOTLIGHT had been removed along with approximately thirty other newsracks from their locations in front of the San Diego County Courthouse, located at 220 West Broadway. Neither I

nor Liberty received notice pursuant to the dictates of Municipal Code Section 62:1007. I subsequently learned that the newsrack was removed pursuant to GENERAL ORDER NO. 2-14-94. Since that time, and because of the arrest of Jim Harnsberger and GENERAL ORDER NO. 102093, I and Liberty did not replace the newsrack for fear of being arrested and prosecuted for contempt of court. To date the newsrack has not been returned.

8. That in or about March 13, 1994, I had taken photographs of the area in front of the San Diego County Courthouse that shows where the newsrack that held THE SPOTLIGHT and other newsracks were located. These photographs (lodged as Exhibit "P") demonstrate that there is no "security" or "safety" or "appearance" problem where the newsracks were located. The following is a summary of each photograph and what it depicts.

Exhibits P-15 and P-16 were taken in front of the San Diego County Courthouse located on 220 West Broadway from a west to east perspective. The black wall in P-15 and P-16 shows where the newsracks were located, which were placed directly against the black wall. The discolored areas on the sidewalk by the black wall is new cement that covered the area where the bolts were located that held the newsracks to the sidewalk.

Exhibit P-17 was taken in the same place at the Courthouse but from an east to west perspective. This photograph also shows the locations where the newsracks were bolted to the sidewalk.

In addition, I found the location where the newsracks were dumped. Exhibit P-18 was taken in or about March 20, 1994, at a the judges' parking lot at the Courthouse where the newsracks were dumped and probably damaged.

9. That I feel that I and Liberty have been irreparably harmed because of the blatant interference with our First Amendment rights to freedom of speech, press, and assembly.

I declare under the penalty of perjury under the laws of the United States of America and State of California that the foregoing is true and correct.

Executed this 20th day of July, 1994, at San Diego, California.

/s/ Dave Cadway
DAVE CADWAY

## APPENDIX G

## DIVISION 10

Newsracks on Public Rights of Way—Locations
*(Added 12-6-74 by O-11457 N.S.)*

### § 62.1001 Purpose and Intent

The Council of The City of San Diego finds and declares that:

(a) The uncontrolled placement of newsracks in public rights of way presents an inconvenience and danger to the safety and welfare of persons using such rights of way, including pedestrians, persons entering and leaving vehicles and buildings, and persons performing essential utility, traffic control and emergency services.

(b) Newsracks so located as to cause an inconvenience or danger to persons using public rights of way, and unsightly newsracks located therein, constitute public nuisances.

(c) The general welfare requires that the aesthetic appearance of public rights of way in the City of San Diego, including the appearance of newsracks, be improved.

(d) The provisions and prohibitions hereinafter contained and enacted are in pursuance of and for the purpose of securing and promoting the public safety and general welfare of persons in the City of San Diego in their use of public rights of way.

*(Added 12-6-74 by O-11457 N.S.)*

### § 62.1002 Definitions

Whenever the following words and phrases are used in this division, they shall have the meaning ascribed to them in this section:

(a) "Distributor" shall mean the person responsible for placing and maintaining a newsrack in a public right of way.

(b) "Newsrack" shall mean any self-service or coin-operated box, container, storage unit, or other dispenser installed, used or maintained for the display, sale or distribution of publications.

(c) "Parkway" shall mean the area between the sidewalk and the curb of a roadway, and where there is no sidewalk, that area between the edge of the traveled roadway and the edge of a public right of way. "Parkway" also includes any area within a roadway that is not open to vehicular travel.

(d) "Public Right of Way" shall mean any place of any nature which is dedicated to use by the public for pedestrian and vehicular travel, and includes, but is not limited to, a street, sidewalk, curb, gutter, crossing, intersection, parkway, highway, alley, lane, mall, court, way, avenue, boulevard, road, roadway, viaduct, subway, tunnel, bridge, thoroughfare, park, square; and any other similar public way.

(e) "Roadway" shall mean that part of a public right of way that is designated and used primarily for vehicular travel.

(f) "Sidewalk" shall mean that part of a public right of way that is designated and ordinarly used for pedestrian travel.

*(Added 12-6-74 by O-11457 N.S.)*

**§ 62.1003 Prohibition**

No person shall knowingly place, install, use or maintain any newsrack which rests in whole or in part upon, in, or on any portion of a public right of way or which projects onto, into, or over any part of a public right of way except in compliance with the provisions of this division.

*(Added 12-6-74 by O-11457 N.S.)*

**§ 62.1004 Standards for Newsracks**

Any newsrack which rests in whole or in part upon, in, or on any portion of a public right of way or which projects onto, into, or over any part of a public right of way shall comply with the standards set forth in this section:

(a) No newsrack shall exceed sixty (60) inches in height, thirty (30) inches in width, or twenty-four (24) inches in thickness.

(b) No advertising signs or material, other than those dealing with the name of the publication contained within the newsrack, shall be displayed on the outside of any newsrack.

(c) Each newsrack shall be equipped with a coin-return mechanism to permit a person using the machine to secure an immediate refund in the event he is unable to receive the publication paid for. The coin-return mechanisms shall be maintained in good working order.

(d) Each newsrack shall have affixed to it in a readily visible place so as to be seen by anyone using the newsrack a notice setting forth the name and address of the distributor and the telephone number of a working telephone service to call to report a malfunction of the coin-return mechanism, or to give the notices provided for in this division.

(e) Each newsrack shall be maintained in a neat and clean condition and in good repair at all times. Specifically, but without limiting the generality of the foregoing, each newsrack shall be serviced and maintained so that: (1) it is reasonably free of dirt and grease; (2) it is reasonably free of chipped, faded, peeling and cracked paint in the visible painted areas thereof; (3) it is reasonably free of rust and corrosion in the visible unpainted metal areas thereof; (4) the clear plastic or glass parts thereof, if any, through which the publications therein are viewed are unbroken and reasonably free of cracks, dents,

blemishes and discoloration; (5) the paper or cardboard parts or inserts thereof are reasonably free of tears, peeling or fading; and (6) the structural parts thereof are not broken or unduly misshapen.

*(Added 12-6-74 by O-11457 N.S.)*

**§ 62.1005 Location of Newsracks**

Any newsrack which rests in whole or in part upon, in, or on any portion of a public right of way or which projects onto, into, or over any part of a public right of way shall be located in accordance with the provisions of this section:

(a) No newsrack shall be located in whole or in part in any roadway.

(b) Newsracks shall be located only near the curb (or, if there be no curb, the edge of the roadway) or the wall of a building. Newsracks located near the curb shall be located no less than eighteen (18) inches nor more than twenty-four (24) inches from the roadway edge of the curb. Newksracks located adjacent to a building shall be located paralled to and not more than six (6) inches from the wall thereof. No newsrack shall be located directly in front of any display window of any building abutting a sidewalk or parkway except near the curb. No newsrack shall be located on the sidewalk or parkway directly opposite a newsstand or another newsrack.

(c) No newsrack shall be chained, bolted, or otherwise attached to any fixture located in the public right of way, except to other newsracks.

(d) Newsracks may be placed next to each other, provided that no group of newsracks shall extend for a distance of more than ten (10) feet along a curb, and a space of not less than five (5) feet shall separate each group of newsracks.

(e) No newsrack shall be placed, installed, used or maintained:

(1) Within three (3) feet of any marked crosswalk.

(2) Within twelve (12) feet of the curb return of any unmarked crosswalk.

(3) Within three (3) feet of any fire hydrant, fire call box, police call box or other emergency facility.

(4) Within three (3) feet of any driveway.

(5) Within three (3) feet ahead or fifteen (15) feet to the rear of any sign marking a designated bus stop.

(6) Within three (3) feet of the outer end of any bus bench.

(7) At any location whereby the clear space for the passageway of pedestrians is reduced to less than six (6) feet.

(8) Within three (3) feet of or on any public area improved with lawn, flowers, shrubs, trees or other landscaping.

(9) Within one hundred (100) feet of any other newsrack on the same side of the street in the same block containing the same issue or edition of the same publication.

(10) Within five (5) feet of a curb painted blue, pursuant to the provisions of California Vehicle Code section 21458.

The provisions contained in subsection (e) of this section shall not apply if compliance with the provisions would prohibit the placement of newsracks for a distance of one hundred fifty (150) feet on the same side of the street in the same block.

*(Amended 5-20-85 by O-16429 N.S.)*

**§ 62.1006 Uniform Newsracks Required at Certain Locations**

(a) The clutter and congestion of numerous disparate types of newsracks at certain locations in the public rights

of way is detrimental to the public safety, convenience and general welfare. Accordingly, the public interest requires that newsrack facilities of uniform and coordinated construction and appearance be utilized at such locations.

(b) The City Manager shall implement this policy by determining, from time to time, which locations require any such facilities and by determining the standards for such facilities at each such location.

(c) The City Manager shall make such determinations for each such location only after holding a public hearing on the subject at which all persons interested shall be given a reasonable opportunity to be heard. The City Manager shall conduct a public hearing when it is brought to his attention by his own investigations, a member of the City Council, newspaper distributor, civic organization, citizens, or by any other means, that certain locations might require uniform newsrack facilities. Notice of such public hearing shall be given to each person reasonably known to him to be maintaining a newsrack or newsracks within the public right of way, and to each person who has requested, in writing, that a public hearing be held.

(d) In determining which locations, if any, require uniform newsrack facilities, the City Manager shall make the following findings: (1) the location contains four or more newsracks within a space of fifty (50) feet; (2) the location is an area extensively used by the general public and carries a heavy volume of pedestrian traffic; and (3) such uniform newsrack facilities are feasible at that location.

(e) In determining the types of uniform newsrack facilities to be required at each such location, the City Manager shall apply the following guidelines:

(1) The newsrack facilities shall be located so as to maximize the public convenience and safety, both as to accessibility to the newsracks and the use of the public

right of way as a thoroughfare, and the aesthetic appearance of the area.

(2) The type and appearance, including colors, of the newsrack facilities shall blend with the surroundings of the particular location to the extent practicable.

(3) The most economical types of newsrack facilities shall be selected, consistent with the ends to be achieved.

(4) Absolute uniformity in size and configuration shall not necessarily be required. For example, larger or multiple newsracks may be permitted for bulky or frequently issued publications and smaller units may be permitted for small publications or publications with greater intervals of issuance.

(5) Standards shall be specified so as to permit a reasonably wide selection of newsrack facilities available on the market. Manufacturers shall not be specified by name unless equivalents are also permitted, nor shall the standards be so narrowly drawn as to restrict the selection to only one proprietary brand.

(f) The City Manager shall reduce his findings to writing and shall give written notice thereof to the persons referred to in subsection (c) of this section prior to their implementation.

(g) The City shall, at its expense, furnish, install and maintain the common supporting structures, if any, for such newsracks. The distributors of each publication shall, at their expense, furnish, install and maintain the individual newsrack units. Except as applied by the City Manager, the provisions of Section 62.1005 shall not apply to newsracks installed and maintained pursuant to this section. Subject to the foregoing, and except as otherwise determined by the City Manager, the provisions of this division shall apply fully to newsrack facilities installed pursuant to this section.

(h) After the City Manager has made said determinations, and after the City has installed the supporting structures or the location is otherwise ready for the individual newsrack units to be installed, no person shall place, install, use or maintain any newsrack at that location except in conformance with the standards prescribed therefor by the City Manager. "Location" as used in the foregoing sentence shall mean any place within one hundred fifty (150) feet of the place designated for the installation of said uniform newsracks unless it is separated therefrom by a street or a sidewalk corner. Nothing herein contained shall be construed to prevent a distributor from using a nonconforming newsrack during the period that (1) an adequate supporting structure is not available; or (2) he cannot obtain a conforming newsrack unit because one is not available; or (3) his unit is undergoing needed maintenance or repairs and a replacement is not reasonably available; or (4) he is diligently proceeding to replace a unit; or (5) an emergency exists during which he would otherwise be prevented from distributing his publications by means of a newsrack at that location, provided that he acts diligently to correct the situation.

(i) The relative location of individual newsrack units shall be determined and may be rotated from time to time by agreement among the distributors. Should they be unable to agree, the City Manager shall annually determine the relative location by lot.

*(Added 12-6-74 by O-11457 N.S.)*

**§ 62.1007 Enforcement**

Upon a determination by the City Manager that a newsrack has been installed, used or maintained in violation of any of the provisions of this division, he shall cause an order to be issued to the distributor to correct the offending condition. The order shall be telephoned to the distributor and confirmed by mailing a copy of

the order by certified mail, return receipt requested, to the distributor at the address shown on the notice required by Section 62.1004(d). The order shall specifically describe the offending condition and suggest actions necessary to correct it. If one distributor fails to correct properly the offending condition within three (3) days (excluding Saturdays, Sundays and legal holidays) after receipt of the order, the City Manager shall cause the offending newsrack to be summarily removed and processed as unclaimed property under applicable provisions of law relating thereto. If the distributor of the offending newsrack cannot be identified, the newsrack shall be removed immediately and processed as unclaimed property under applicable provisions of law. The foregoing provisions are not exclusive, and are in addition to any other penalty or remedy provided by law.

*(Added 12-6-74 by O-11457 N.S.)*

**§ 62.1008 Appeal**

Within ten (10) days after receipt of the decision of the City Manager pursuant to the provisions of Section 62.1006(f), any party affected by the decision may file with the City Clerk a written request for a public hearing before the City Council. Upon the filing of such a request, the City Clerk shall set a time and place for the hearing and shall notify the party thereof at least five (5) days before the hearing date. The hearing shall be held within thirty (30) days after the request is filed. The decision of the City Council shall be final in the absence of fraud or collusion.

*(Added 12-6-74 by O-11457 N.S.)*

**§ 62.1009 Other Violations**

In the case of minor violations of this division that can be corrected on the spot, any City employee, as an alternative to removal of the newsrack, is authorized to correct the violation summarily.

*(Added 12-6-74 by O-11457 N.S.)*

**§ 62.1010 Public Nuisance**

Any newsrack, or any publication offered for sale or distribution, in violation of this division shall constitute a public nuisance, and may be abated in accordance with applicable provisions of law.

*(Added 12-6-74 by O-11457 N.S.)*

**§ 62.1011 Abandonment**

In the event a newsrack remains empty for a period of thirty (30) continuous days, the same shall be deemed abandoned, and may be treated in the manner as provided in Section 62.1007 for newsracks in violation of the provisions of this decision.

*(Added 12-6-74 by O-11457 N.S.)*

**§ 62.1012 City Manager's Designated Representative**

"City Manager" as used in this division shall include his designated representative.

*(Added 12-6-74 by O-11457 N.S.)*

Supreme Court, U.S.
FILED
JUN 21 1996
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No. 95-1896

In The

# Supreme Court of the United States

October Term, 1995

FULLY INFORMED JURY ASSOCIATION, et al.,

*Petitioners,*

v.

COUNTY OF SAN DIEGO, et al.,

*Respondents.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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13 pp

## QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals correctly determined that general orders issued by a state court were constitutionally permissible. The general order prohibited certain communication "tending to influence, interfere or impede the lawful discharge" of a trial juror's duties, and removed all newsracks from the sidewalk in front of the court building.

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**TO THE HONORABLE SUPREME COURT:**

Defendant/respondent County of San Diego, a political subdivision of the State of California, submit this brief in opposition to the petition for a writ of certiorari submitted by plaintiffs/petitioners Fully Informed Jury Association, et al.[1]

## INTRODUCTION

Petitioners, the Fully Informed Jury Association, et al., seek review of an unpublished opinion of the Ninth Circuit Court of Appeals upholding the constitutionality of two general orders issued by the Superior Court of the State of California, sitting in San Diego County. Respondent County of San Diego respectfully requests that the petition be denied.

## STATEMENT OF THE CASE[2]

Petitioners challenge the constitutionality of two General Orders issued by the state courts. General Order 102093, enacted by the Superior Court in 1993, prohibits

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[1] The respondent does not contest the petitioners' statement of jurisdiction or reference to the constitutional provisions involved.

[2] As explained more fully below, the petition contains material misstatements of fact. Sup. Ct. R. 15.2. Several of the misstatements are egregious, particularly petitioners' repeated assertion that the General Orders in question apply only to their jury nullification materials.

> "[t]he distribution or attempted distribution of any written materials tending to influence, interfere or impede the lawful discharge of the duties of a trial juror, and communication or attempt so to communicate with any person summoned, drawn or serving as a trial juror in these courts for purposes of so influencing, interfering or impeding the lawful discharge of the duties of a trial juror in or within 50 yards of any public entrance to"

the courthouse. Petitioner's Appendix C, p. 21a. General Order 102093 is a concise unambiguous attempt to control communication that interferes with or obstructs the lawful administration of justice. Contrary to petitioners' repeated misstatement, Order 102093 does not apply solely to their written jury nullification materials. *Cf.* Petition pp. (i), 3, 11. Order 102093 applies to all communication "influencing, interfering or impeding the lawful discharge of the duties of a trial juror."

The second order, General Order 2-14-94, commands that all

> "vendors and distributors of newspapers distributed from newsracks currently placed on the sidewalk bordering the front entrance of the San Diego County Courthouse . . . shall remove said newsracks to another location" within two weeks.

Petitioner's Appendix D, p. 24a. The preamble of that Order discusses how the newsracks interfere with safe passage to and from the courthouse, cause clutter and congestion and "detract from the dignity and appearance of San Diego County's main House of Justice." *Id.*, at 23a.

In October 1994, the district court granted respondents' motion to dismiss and denied petitioners' request to enjoin enforcement of the two General Orders. Petitioners' Appendix B. Petitioners timely appealed to the Ninth Circuit, which affirmed the district court's judgment in February 1996. Petitioners' Appendix A. The Ninth Circuit panel separately analyzed the two General Orders, concluding that both were constitutionally proper under the appropriate balancing tests.[3] This Petition followed.

## REASONS TO DENY CERTIORARI

### I. Petitioners Offer No Justification to Hear this Case Under the Supreme Court Rules

Petitioners fail to identify any compelling reason for this Court to hear this case. Sup. Ct. R. 10 [certiorari will be granted only for compelling reasons]. The Supreme Court Rules offer several situations under which this Court may grant a petition for certiorari. *Id.* None are present here.

Petitioners offer no case at either the federal or state level in conflict with the result reached by the Ninth

[3] Petitioners again misstate the record in discussing the Ninth Circuit's decision. The Ninth Circuit did *not* rule that General Order 102093 was a content-based regulation on speech. *Cf.* Petition p. 11. The Ninth Circuit ruled that General Order 102093 was constitutionally proper "[e]ven assuming [it] is a content-based restriction on political speech in a public forum, and so entitled to the most exacting scrutiny" by the court. Petitioners' Appendix A, p. 2a.

Circuit, and none are known to respondents. Sup. Ct. R. 10(a). Petitioners do not even suggest that the Ninth Circuit's ruling conflicts with any federal or state precedent.

Further, the Ninth Circuit's ruling cannot be said to implicate an important federal question that has not been, but should be, settled by this Court. Sup. Ct. R. 10(b). The issues petitioners raise involve well-settled areas of First Amendment jurisprudence; indeed, as discussed below, one of the regulations at issue here is strikingly similar to the regulation this Court approved over thirty years ago in *Cox v. Louisiana*, 379 U.S. 559 (1965).

## II. General Order 102093 is Constitutionally Proper

Petitioners assert that General Order 102093 applies only to their political speech, and thus label the order a content-based regulation. This misstates the record. Order 102093 prohibits

> "distribution [of] written materials tending to influence, interfere or impede the lawful discharge of the duties of a trial juror . . . in or within 50 yards of any public entrance to"

the courthouse. This is a content-neutral restriction. The Order applies to *any* materials that have the proscribed effects, whether the materials are from petitioners, any plaintiff, any defendant, or any other person or group which seeks to "influence, interfere or impede the lawful discharge of the duties of a trial juror." *See Boos v. Barry*, 485 U.S. 312, 320 (1988) [content-neutral restrictions are "those that are justified without reference to the content

of the regulated speech"]; *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

The Ninth Circuit did not rule on the question of whether Order 102093 was content-neutral. *Cf.* Petition p. 11. Rather, the court *assumed* that the regulation was content-based and found it permissible even under this "most exacting scrutiny." Petitioner's Appendix A, p. 2a. Content-based restrictions are not *per se* invalid but

> "must be subjected to the most exacting scrutiny. Thus we have required the State to show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."

*Boos, supra*, 485 U.S. at 321 [citations omitted]. Even under this most exacting degree of constitutional scrutiny, the prohibitions posed by Order 102093 are constitutionally proper.[4]

It is difficult to conceive of a more compelling state interest under our system of government than the integrity of the judicial system. As this Court has stated,

> "[t]here can be no question that a State has a legitimate interest in protecting its judicial system from the pressures which [First Amendment activities] near a courthouse might create. Since we are committed to a government of laws and not men, it is of the utmost importance that the administration of justice be absolutely fair and

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[4] Obviously, if the regulation is constitutionally permissible under the most exacting level of scrutiny, it will be constitutionally proper under the less strict test applied to a content-neutral regulation.

> orderly. This Court has recognized that the unhindered and untrammeled functioning of our courts is part of the very foundation of our constitutional democracy. . . . A state may adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence."

*Cox v. Louisiana*, 379 U.S. 559, 562 (1965).

Petitioners attempt to distinguish *Cox* by asserting that the statute at issue there applied only to picketing. Petition, p. 14. This purported distinction is immaterial. The *Cox* statute indeed applied to pickets and parades "in or near" a courthouse. *Id.* at 560. The statute, however, only applied to such communicative activity "with the intent of interfering with, obstructing or impeding the administration of justice or with the intent of influencing any judge, juror, witness or court officer." *Id.* The proscription against communications influencing, interfering with or impeding the judicial process approved in *Cox* is the same proscription presented in General Order 102093.

Moreover, General Order 102093 is both more narrow and specific than the statute upheld in *Cox*. Where the *Cox* statute proscribed certain communications with "any judge, juror, witness or court officer," General Order 102093 applies only to communications with jurors. Where the *Cox* statute proscribed certain communication "in or near" the courthouse, General Order 102093 applies only within fifty yards of a public entrance to the courthouse.

In other words, this Court has already addressed the First Amendment questions allegedly posed by General Order 102093. Petitioners' petition for *certiorari* does not

implicate an important federal question that has not been, but should be, settled by this Court. Sup. Ct. R. 10(b). General Order 102093 is constitutionally proper because it serves a compelling state interest and is narrowly drawn to achieve that end.

## III. General Order 2-14-94 is Constitutionally Proper

Petitioners characterize General Order 2-14-94 as a content-based regulation. Petition, p. 17. Petitioners again misstate the record. General Order 2-14-94 applies to all newsracks placed on the sidewalk bordering the courthouse, regardless of content. It is therefore content-neutral. *See Ward*, 491 U.S. at 791 [regulation "that serves purposes unrelated to the content of expression is deemed neutral even if it has an incidental effect on some speakers or messages but not others"].

General Order 2-14-94 also "leave[s] open ample alternative channels for communication of the information." *Id.* The Order applies to newsracks only on the sidewalk bordering the front entrance to the courthouse. Vendors and distributors remain free to move their newsracks virtually anywhere else. Likewise, the Order does not restrict the right of vendors to sell or distribute publications in a manner that does not employ newsracks. The Order also in no way regulates other forms of expressive conduct that do not involve publications in newsracks.

Finally, the Order is "narrowly tailored to serve a significant governmental interest." *Id.* A regulation is narrowly tailored so long as it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 799.

> "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by a less speech-restrictive alternative."

*Id.* at 800. Safe public access to the courthouse and the "dignity and appearance" of the "County's main House of Justice" are significant governmental interests, as are avoiding clutter and congestion in front of the building.

In short, this Court has addressed the federal questions raised in petitioners' petition for *certiorari* regarding General Order 2-14-94. The Order is a valid time, place, and manner restriction under applicable First Amendment principles. There is no compelling reason for this Court to review the newsrack regulation.

## CONCLUSION

For the foregoing reasons, respondent County of San Diego respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

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In The

**SUPREME COURT OF THE UNITED STATES**
October Term, 1995

FULLY INFORMED JURY ASSOCIATION, et al.,

Petitioners,

v.

COUNTY OF SAN DIEGO, et al.,

Respondents.

# RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the City of San Diego is a proper respondent in this matter.

2. Whether the Ninth Circuit Court of Appeals erred in concluding that General Order No. 102093 and General Order No. 2-14-94 were valid place and manner restrictions issued by the San Diego County Courts.

## PARTIES TO THE PROCEEDING

Respondent agrees with Petitioners' list of parties in the caption of the Petition for Writ of Certiorari. However, it is the position of these Respondents' that the City of San Diego and its Police Chief, Jerry Sanders, should no longer be parties to this matter.

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## OPINION BELOW JURISDICTION, CONSTITUTIONAL PROVISIONS AND GENERAL ORDERS INVOLVED IN THIS PROCEEDING

Respondent agrees with petitioners' statement regarding the opinions below, jurisdiction of this court, and the constitutional provision and general orders involved in this case.

## SUMMARY OF ARGUMENT

The City of San Diego and San Diego Chief of Police, Jerry Sanders were named as parties to the original complaint. However, there are no allegations regarding any actions by the City which remain at issue in this matter. The Ninth Circuit was correct in affirming the judgment of the district court in regards to City respondents based upon the lack of allegations of any action on the part of the City and Police Chief Sanders.

In addition, the Ninth Circuit Court of Appeals was correct in finding that the challenged orders are proper exercises of a court's inherent authority to take supervisory and administrative actions necessary to implement its judicial functions. The appellate court correctly applied *Burson v. Freeman*, 504 U.S. 191 (1992) and *Cox v. Louisiana*, 379 U.S. 559 (1965), in determining that the first regulation was necessary to serve the compelling state interest in protecting the integrity of the jury system and is narrowly tailored to achieve that end. In addition, the appellate court was correct in applying the standards set forth in *Ward v. Rock Against Racism*, 491

U.S. 781 (1989), in finding the second regulation a content neutral restriction narrowly tailored to further the significant state interest in securing the area around the court house and leaves open ample alternative channels of communication of information.

Furthermore, petitioner seeks review of concurrent findings of fact of two lower courts. There are no novel constitutional issues to be considered here, and there is no conflict between any circuits as to the applicable laws and cases. Therefore this mattter is not appropriate for review by this court.

## STATEMENT OF THE CASE

On October 22, 1993, the presiding judges of the San Diego Superior and Municipal Courts issued an order in response to the distribution of written materials advocating jury nullification to persons entering the San Diego County Superior Court. Noting that the doctrine of jury nullification is contrary to law, General Order No. 102093 was issued with the purpose of protecting the lawful and orderly administration of justice and the right to trial by jury. The order prohibited the distribution of written materials to or communications with trial jurors intended to influence or interfere with the proper discharge of the duties of trial jurors within 50 yards of the front entrance of facilities within which jury trials are held. Respondents, City of San Diego and Police Chief Jerry Sanders, took no part in the issuance or enforcement of this order.

On February 14, 1994, the presiding judge of the San Diego County Superior Court issued General Order No. 2-14-94 which ordered the removal of all newsracks located on the sidewalk bordering the front entrance of the San Diego County

Courthouse within two weeks of the date of the order. The concern addressed by the order was to protect public safety by eliminating congestion in front of the courthouse and the elimination of the detraction from the dignity and appearance of the County's main courthouse. Respondents, City of San Diego and Police Chief Sanders, had no involvement with either the issuance of the order or the removal of the newsracks.

Petitioners filed a complaint in the United States District Court for the Southern District of California on July 21, 1994. The complaint requested a temporary restraining order, preliminary and permanent injunctions, declaratory relief and damages pursuant to 42 U.S.C. section 1983. City respondent was named as a defendant in petitioners' complaint on the basis of allegations that the city newsrack ordinance was unconstitutional and that the ordinance was cited in the general order. Additionally, the complaint contained allegations regarding demonstrations held by members of the Fully Informed Jury Association near City Hall and near the County Administration Building. Petitioners' alleged that a person told

them to leave or the police would be called. There were no allegations that the police were notified, took any action, or that the demonstration stopped.

On August 15, 1994, respondent, City of San Diego, filed a motion to dismiss pursuant to Fed. R. Civ. P. 12 (b)(6) and a motion for a more definite statement with the district court. City respondent filed a motion in opposition to petitioners' preliminary injunction on September 23, 1994, on grounds that petitioners alleged no action on the part of the city which violated petitioners' constitutional rights.

The district court granted respondents' motion to dismiss on October 31, 1994, finding that petitioners had alleged no action on the part of respondents that deprived petitioners of their constitutional rights. That same day the district court denied petitioners' motion for preliminary injunction on grounds that both orders were valid place and manner restrictions. Petitioners' were given leave to amend regarding the demonstration allegations, which they did not do. Petitioners' filed a timely appeal to the Ninth Circuit Court of

Appeals, which affirmed the judgement below. In the papers and at the oral argument at the Ninth Circuit Petitioners' made clear they were no longer the challenging the consitutionality of the Newsrack Ordinance.

**A. THE NINTH CIRCUIT COURT OF APPEALS CORRECTLY APPLIED THE LAW GOVERNING RESTRICTIONS ON SPEECH IN PUBLIC FORUMS, AND DID NOT CREATE ANY LACK OF UNIFORMITY IN THE LAW GOVERNING FREE SPEECH**

The Ninth Circuit Court of Appeals, in its opinion, held that both General Order No. 102093 and General Order No. 2-14-94 were proper exercises of a courts inherent authority to take supervisory and administrative actions necessary to implement its judicial function. (Petitioners Appendix A, page 3a). Additionally, based on that holding, the Court affirmed the district court decision to grant the City respondents motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). (*Id.*)

The Ninth Circuit examined General Order No. 102093 under *Burson v. Freeman*, 504 U.S. 191 (1992), and *Cox v. Louisiana*, 379 U.S. 559 (1965). Contrary to petitioners'

contention that the facts presented in this matter do not fit within this court's decisions in *Burson* and *Cox*, neither case limited its reasoning to identical factual situations and were appropriately considered by the appellate court. The Ninth Circuit neither misapprehended nor misapplied those cases in its opinion. The court addressed each factor set forth in those cases and concluded that the regulation was necessary to serve the state's compelling interest in protecting the integrity of the jury system. In addition, the court found the restriction to be narrowly tailored to achieve that end. Thus, the court properly found that each element set forth in *Burson* and *Cox* was satisfied. (*Id.* at 2a-3a).

Additionally, the Ninth Circuit's application of *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), to General Order No. 2-14-94 was appropriate. The Ninth Circuit found application of the order to all newsracks located on the sidewalk bordering the front of the courthouse to be content neutral and recognized that *Ward* sets forth the appropriate standard for determining the constitutionality of content neutral regulations

of speech. The court addressed each factor and did not deviate from the standard set forth in that case. (*Id.* at 3a).

For those reasons, it is respectfully requested that Petitioners' petition be denied.

**B. THIS CASE TURNS SOLELY UPON THE ANALYSIS OF FACTUAL FINDINGS MADE BY THE DISTRICT COURT AND AFFIRMED BY THE COURT OF APPEALS**

Respondent contends that petitioner seeks review of concurrent findings of fact of two lower courts and that petitioner has shown no evidence to indicate a gross misapplication of law. This case turns upon the analysis of the propriety of the issuance of the two court orders. Petitioner would have the court determine factually whether General Order No. 102093 and General Order No. 2-14-94 are proper regulations of political speech and press in a public forum. Both the district court and the appellate court found the issuance of General Order Nos. 102093 and 2-14-94 to be proper exercises of a court's inherent authority to ensure the proper administration of justice. The appellate court found no clear error on the part of the district court. The appellate court

affirmed the district court's determination that the restrictions in General Order No. 102093 were necessary to serve the state's compelling interest in protecting the integrity of the jury system and narrowly drawn to achieve that end. The appellate court also found no error in the in regards to the second order. General Order No. 2-14-94 was found to be a content neutral regulation narrowly drawn to further a significant state interest in securing the area around the courthouse and leaving ample alternative channels for communication of the information.

Because the district court and appellate court have made concurrent findings of fact regarding the appropriateness of the orders issued in this case and petitioner has shown no clear error, the factual findings of the appellate court must be accorded deference. Therefore this case is not appropriate for review by this court. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987). For this reason, it is respectfully requested that Petitioner's petition be denied.

## C. THE CITY OF SAN DIEGO AND ITS POLICE CHIEF WERE NOT INVOLVED IN THE ISSUANCE OF THE ORDERS, NOR THEIR ENFORCEMENT.

The Ninth Circuit was correct in affirming the district courts decision regarding the constitutionality of City respondents' Municipal Code sections 62.1001-62.1013. The district court determined that there had been no allegations that the City had anything to do with the issuance of either order. (Petitioners' Appendix B, pages 8a-9a). Furthermore petitioners failed to allege any action on the part of the City of San Diego or San Diego Police Chief Jerry Sanders in regards to the enforcement of the orders. (*Id.*). Therefore, the City of San Diego is no longer a proper party to this matter.

## D. THIS CASE DOES NOT RAISE QUESTIONS OF EXCEPTIONAL IMPORTANCE

While clearly freedom of speech is an important and fundamental right, this case does not present a matter of exceptional importance. Petitioners speculate as to the effect on society regarding jury nullification, but that is a political matter outside the scope of this case. This case deals with the ability of a court to properly administer its business, given the dictates of

the rights guaranteed by the Constitution. The lower courts correctly applied the applicable standards and determined that these orders were proper excercises of judicial authority, and that the City of San Diego and its Police Chief were not involved in this matter. For those reasons, it is respectfully requested that Petitioners' petition be denied.

## CONCLUSION

The Ninth Circuit Court of Appeals did not misapprehend or misapply any points of law or facts in reaching its decision in this matter. The district court and the appellate court considered petitioners' arguments and made concurrent findings of fact which do not warrant review by this court. The City of San Diego and Police Chief Sanders are not proper parties before

this court. For those reasons, Respondent respectfully requests that Petitioners' Petition for Writ of Certiorari be denied.

Dated: June 21, 1996

JOHN W. WITT, City Attorney

By James M. Chapin

James M. Chapin
Deputy City Attorney

Attorneys for Respondents
City of San Diego and Police
Chief Sanders

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

**CERTIFICATE OF SERVICE**

I, James M. Chapin, declare that I am, and was at the time of service of the papers herein referred to, am the attorney of record in the within action, and am a member of the bar of this Court, representing Respondents City of San Diego and Chief Sanders. I am a citizen of the United States, over the age of 18, and not a party to the within action. My business address is 1200 Third Avenue, Suite 1200, San Diego, California 92101.

On June 21, 1996, I served the **Response to Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Ciruit** on the following by placing one copy thereof in a separate envelope for each addressess named hereafter, addressed to each such addressee respectively as follows:

Peter D. Lepiscopo, Esq.
2635 Camino del Rio South
Suite 108
San Diego, California 92108

Clerk of Court
United States Court of Appeals
For the Ninth Circuit
121 Spear Street
P.O. Box 193939
San Francisco, CA 94119

I thereafter sealed and deposited such envelope in a United States mailbox with first-class postage prepaid.

I declare under penalty of perjury, under the laws of the State of California, that the above is true and correct. Executed this 21st day of June, 1996, in San Diego, California.

James M Chapin

James M. Chapin